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Quick on the Draw: Implicit Bias and the Second Amendment

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ABSTRACT

African Americans face a significant and menacing threat, but it is not the one that has preoccupied the press, pundits, and policy makers in the wake of several bigoted murders and a resurgent white supremacist movement. While hate crimes and hate groups demand continued vigilance, if we are truly to protect our minority citizens, we must shift our most urgent attention from neo-Nazis stockpiling weapons to the seemingly benign gun owners among us—our friends, family, and neighbors—who show no animus toward African Americans and who profess genuine commitments to equality.

Our commonsense narratives about racism and guns—centered on a conception of humans as autonomous, self-transparent, rational

actors—are outdated and strongly contradicted by recent evidence from the mind sciences.

Advances in implicit social cognition reveal that most people carry biases against racial minorities beyond their conscious awareness. These biases affect critical behavior, including the actions of individuals performing shooting tasks. In simulations, Americans are faster and more accurate when firing on armed blacks than when firing on armed whites, and faster and more accurate in electing to hold their fire when confronting unarmed whites than when confronting unarmed blacks. Yet, studies suggest that people who carry implicit racial bias may be able to counteract its effects through training.

Given recent expansions in gun rights and gun ownership—and the hundreds of thousands, if not millions, of private citizens who already use firearms in self-defense each year—this is reason for serious concern. While police officers often receive substantial simulation training in the use of weapons that, in laboratory experiments, appears to help them control for implicit bias, members of the public who purchase guns are under no similar practice duties.

In addressing this grave danger, states and local governments should require ongoing training courses for all gun owners similar to other existing licensing regimes. Such an approach is unlikely to run into constitutional problems and is more politically tenable than alternative solutions.

Even with the murders that have already occurred, Americans are not paying enough attention to the frightening connection between the right-wing hate-mongers who continue to slither among us and the gun crazies who believe a well-aimed bullet is the ticket to all their dreams.¹

– Bob Herbert

INTRODUCTION

A. Racism, Guns, and Fear

There is a dangerous link between biases against racial minorities and the fight for gun rights. Journalists, academics, public advocates, and government policy makers have identified the first part of that connection: right-wing hate groups in the United States

¹ Bob Herbert, Op-Ed., *A Threat We Can't Ignore*, N.Y. TIMES, June 19, 2009, <http://www.nytimes.com/2009/06/20/opinion/20herbert.html>.

frequently assert the necessity of an armed citizenry as a bulwark against government tyranny and are provoked by the perceived threat of firearm restrictions.

As a report issued in April 2009 by the U.S. Department of Homeland Security warned, the fear of gun regulations and bans is linked to increases in recruitment by right-wing extremist organizations (particularly white supremacist groups and militias) and to spurring the planning and implementation of violence.² The Anti-Defamation League offered a similar articulation of the threat to racial, ethnic, and religious groups in a recent amicus brief filed in *McDonald v. City of Chicago*.³ Arguing that applying the Second Amendment to the states would imperil minorities, the brief noted that

[e]xtremist[s] . . . tend to share several characteristics: an obsessive fascination with firearms; a paranoid distrust of the government or a deep-seated hatred for particular minority groups—or both; and a willingness to engage in acts of shocking, often deadly, violence. *Armed* extremism leads to *violent* extremism⁴ with profoundly unsettling frequency and profoundly tragic effects.

James W. von Brunn stands as a paradigmatic example. On June 10, 2009, von Brunn, an eighty-eight-year-old white supremacist, walked into the U.S. Holocaust Memorial Museum and began shooting, killing African American security guard Stephen Tyrone Johns.⁵ Von Brunn's hatred of blacks and Jews was matched by his paranoia concerning an intrusive government; inside the car he double-parked outside the museum, von Brunn left a note: "You want my weapons—this is how you'll get them."⁶

² U.S. DEP'T OF HOMELAND SEC., RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 3, 5 (2009).

³ Brief of Amici Curiae Anti-Defamation League at 5, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

⁴ *Id.*

⁵ Theo Emery & Liz Robbins, *In Note, More Clues to Holocaust Museum Killing*, N.Y. TIMES, June 11, 2009, <http://www.nytimes.com/2009/06/12/us/12shoot.html>.

⁶ *Id.* Prior to the incident, the FBI was well aware that von Brunn had an "established Web site that expressed hatred of African-Americans and Jews." *Id.* (quoting assistant FBI director for the District of Columbia, Joseph Persichini Jr.). Von Brunn believed that Jews, blacks, and other minorities were involved in several conspiracies and ran the court system that had victimized him after he attempted, in December 1981, to take members of the Federal Reserve Board hostage by walking into their Washington headquarters with a bag containing a sawed-off shotgun, revolver, and hunting knife. See David Stout,

To many, the murder brought to mind a similar incident involving another white supremacist two months earlier, in which Richard Poplawski, purportedly motivated by his belief in a Zionist conspiracy and President Barack Obama's imminent ban on firearm ownership, killed three Pittsburgh police officers and wounded a fourth.⁷ His contributions to racist Web sites and interviews with his friends revealed a man whose growing obsession with firearms tied directly into an apocalyptic vision of economic and social collapse fueling the rebirth of a great white nation.⁸

Many commentators and analysts have suggested that these incidents and others like them are a wake-up call that bigotry is alive and well in the United States.⁹ In Bob Herbert's words, "[I]t's the same old filthy racism that has been there all along"¹⁰

This hate, simmering in anti-immigrant rhetoric for years, has been brought to the surface by the election of the nation's first black President, and, according to some, it is made particularly dangerous by those who stir up racial rancor, stoke fears of gun restrictions, and imply that violence (and the threat of violence) is an acceptable way to resolve problems.¹¹ The Department of Homeland Security, for example, has suggested that radical white supremacist groups are

Museum Gunman a Longtime Foe of Government, N.Y. TIMES, June 10, 2009, <http://www.nytimes.com/2009/06/11/us/11shoot.html>.

⁷ See Liz Robbins & Sean D. Hamill, *Gunman Kills 3 Police Officers in Pittsburgh*, N.Y. TIMES, Apr. 4, 2009, <http://www.nytimes.com/2009/04/05/us/05pittsburgh.html>; Sean D. Hamill, *Man Accused in Pittsburgh Killings Voiced Racist Views Online*, N.Y. TIMES, Apr. 7, 2009, <http://www.nytimes.com/2009/04/07/us/07pittsburgh.html>.

⁸ See Rich Lord & Paula Reed Ward, *A Portrait of Contrasts Emerges from Those Who Knew Poplawski*, PITTSBURGH POST-GAZETTE, Apr. 12, 2009; Hamill, *supra* note 7.

⁹ See, e.g., Press Release, Simon Wiesenthal Center, SWC Reaction to Shooting of Security Guard at the US Holocaust Memorial Museum By Self-Identified Anti-Semite, White Supremacist, and Hater of African-Americans (2010) ("[T]he attack . . . shows that the cancer of hatred, bigotry and anti-Semitism is alive and well in America."); Bob Herbert, Op-Ed., *The Way We Are*, N.Y. TIMES, June 13, 2009, <http://www.nytimes.com/2009/06/13/opinion/13herbert.html> ("The bullet that killed [security guard Stephen Tyrone Johns] was a reminder of the continuing menace of bigotry and violence that pervades this country—and that we insist on underestimating.").

¹⁰ Bob Herbert, Op-Ed., *The Scourge Persists*, N.Y. TIMES, Sept. 18, 2009, <http://www.nytimes.com/2009/09/19/opinion/19herbert.html>.

¹¹ See, e.g., Paul Krugman, Op-Ed., *The Big Hate*, N.Y. TIMES, June 11, 2009, <http://www.nytimes.com/2009/06/12/opinion/12krugman.html>; Frank Rich, Op-Ed., *The Obama Haters' Silent Enablers*, N.Y. TIMES, June 13, 2009, <http://www.nytimes.com/2009/06/14/opinion/14rich.html>; Judith Warner, *The Wages of Hate*, Opinionator, N.Y. TIMES, June 11, 2009, <http://opinionator.blogs.nytimes.com/2009/06/11/the-wages-of-hate/>; DeWayne Wickham, *White Racism's Convenient Target: Our President*, USA TODAY, Aug. 18, 2009.

likely to continue to use both Barack Obama's election and the debate over gun-control legislation prompted by the Supreme Court's 2008 decision in *District of Columbia v. Heller*¹² as powerful tools "to recruit new members, mobilize existing supporters, and broaden their scope and appeal through propaganda."¹³

Focusing on more mainstream individuals and groups, Herbert has written of "an increasingly unrestrained manifestation of racism directed toward Mr. Obama that is being fed by hate-mongers on talk radio and is widely tolerated, if not encouraged, by Republican Party leaders."¹⁴ Fellow *New York Times* columnist Judith Warner has pointed to racist jokes and cartoons appearing on Facebook pages and in the mass e-mails of major Republican activists and state senate aides, as well as to bigotry on posters at conservative protests.¹⁵ According to some writers and pundits, politicians and media personalities have not only been active in bolstering and legitimizing racist sentiments but have also made existing bigotry far more dangerous by playing up the extreme threat posed by the Obama government and casting it as the type of threat that can only be addressed with violence.¹⁶ As conservative commentator David Frum has warned,

The Nazi comparisons from Rush Limbaugh; broadcaster Mark Levin asserting that President Obama is "literally at war with the American people"; former vice presidential candidate Sarah Palin claiming that the president was planning "death panels" to extirpate the aged and disabled; the charges that the president is a fascist, a socialist, a Marxist, an illegitimate Kenyan fraud, that he "harbors a deep resentment of America," that he feels a "deep-seated hatred of white people," that his government is preparing concentration camps, that it is operating snitch lines, that it is planning to wipe away American liberties": All this hysterical and provocative talk invites, incites, and prepares a prefabricated justification for violence.

¹² 128 S. Ct. 2783 (2008).

¹³ U.S. DEP'T OF HOMELAND SEC., *supra* note 2, at 2.

¹⁴ Herbert, *supra* note 10; see also Charles M. Blow, Op-Ed., *Black in the Age of Obama*, N.Y. TIMES, Dec. 4, 2009, <http://www.nytimes.com/2009/12/05/opinion/05blow.html> ("We are now inundated with examples of overt racism on a scale to which we are unaccustomed.").

¹⁵ Warner, *supra* note 11.

¹⁶ Joan Walsh, *Can Right-Wing Hate Talk Lead to Murder?*, SALON (June 10, 2009), http://www.salon.com/opinion/walsh/politics/2009/06/10/von_brunn/.

¹⁷ David Frum, *The Reckless Right Courts Violence*, WEEK, Aug. 12, 2009, http://www.theweek.com/bullpen/column/99474/The_reckless_Right_courts_violence.

Frank Rich has provided a similar assessment, writing of “the simmering undertone of violence in our politics” and pointing to Sarah Palin’s failure to condemn people at her rallies who yelled “Treason!,” “Terrorist!,” and “Off with his head!” against Obama, and to Senator Tom “Coburn’s implicit rationalization for far-right fanatics bearing arms at presidential events.”¹⁸ As Herbert has added, “As if [racist extremists like von Brunn and Poplawski] weren’t dangerous enough to begin with, the fuel to further inflame them is available in the over-the-top rhetoric of the National Rifle Association, which has relentlessly pounded the bogus theme that Barack Obama is planning to take away people’s guns.”¹⁹

All of this has led to a set of conclusions on how best to address the concern. While some have continued to push for tighter gun restrictions,²⁰ much of the popular discussion among journalists and academics—and much of the response by the government—has been on cracking down on overt bigots and those who provoke them into action.²¹ Columnist Charles M. Blow, for example, has advocated keeping a more watchful eye out for the bad apples in our midst and intervening before violence takes place.²² Prompted by an increase in hate speech and surging gun sales, the federal government has launched the “Lone Wolf Initiative” to track potential attackers like von Brunn.²³ Other commentators have argued for a stronger prosecutorial response, and, with new appointments in the Civil Rights Division, the Justice Department has increased its load of

¹⁸ Frank Rich, Op-Ed., *The Guns of August*, N.Y. TIMES, Aug. 22, 2009, <http://www.nytimes.com/2009/08/23/opinion/23rich.html>.

¹⁹ Herbert, *supra* note 1. The NRA Web site “GunBaNObam.com” warns, “Obama Would Be the Most Anti-Gun President in American History” and “Hillary Was Right: You Can’t Trust Obama With Your Guns.” GUNBANOBAMA, <http://www.gunbanobama.com> (last visited Oct. 10, 2010).

²⁰ See, e.g., S.A. Miller, *Gun Controllers Say Rampage Aids Cause*, WASH. TIMES, June 11, 2009; Brief of Amici Curiae Anti-Defamation League, *supra* note 3, at 5–6 (arguing that the threat of extremism counsels against incorporation of the Second Amendment and urging the Supreme Court to decide the case narrowly so as not to endanger existing state and local gun controls).

²¹ See, e.g., Herbert, *supra* note 10; Frum, *supra* note 17.

²² See, e.g., Charles M. Blow, Op-Ed., *Hate in a Cocoon of Silence*, N.Y. TIMES, June 12, 2009, <http://www.nytimes.com/2009/06/13/opinion/13blow.html>; Eric Hickey, *Infiltrate and Monitor Hate Groups*, Room for Debate, N.Y. TIMES, June 11, 2009, <http://roomfordebate.blogs.nytimes.com/2009/06/11/hate-crimes-and-extremist-politics/> (arguing for “infiltrating and monitoring” hate groups).

²³ Kevin Johnson, *Feds Try to Detect “Lone Offenders,”* USA TODAY, Aug. 12, 2009.

federal hate crime cases to the highest level since 2001.²⁴ Still other writers and pundits have debated whether hateful content on the Internet—including supremacist Web sites, Facebook pages, and YouTube videos—ought to be regulated.²⁵ And there have even been suggestions that politicians and members of the media should be held accountable (although not necessarily in the legal sense) for attacks by their followers.²⁶

B. Another Connection Story

While drawing attention to the threat of racism and its connection to certain antigovernment gun advocacy is merited, there is another aspect to the relationship between biases against minorities and the Second Amendment that is both far more subtle and potentially far more destructive. Columnists and scholars are not writing or talking about this other story, but it stands as a menace all the same, endangering the lives of people of color on a scale that greatly exceeds the threat of the von Brunns and Poplawskis in our midst.

To understand this dynamic, it is vital to consider how discussions of and responses to prejudice and gun rights—including those outlined above—have been informed by a powerful conception of the autonomous, self-transparent, rational actor. Although this conception of human agency is dominant within the legal sphere and without, the best evidence from social psychology, social cognition, and related fields strongly challenges its realism.²⁷ Taking this

²⁴ See Ian Urbina, *Federal Hate Crime Cases at Highest Level Since '01*, N.Y. TIMES, Dec. 17, 2009, <http://www.nytimes.com/2009/12/18/us/18hate.html>; see also Carrie Johnson, *Justice Official Vows Action on Hate Crimes*, WASH. POST, Dec. 22, 2009, at A6.

²⁵ See, e.g., *Hate Crimes and Extremist Politics*, Room for Debate, N.Y. TIMES, June 11, 2009, <http://roomfordebate.blogs.nytimes.com/2009/06/11/hate-crimes-and-extremist-politics/>; Press Release, Simon Wiesenthal Center, Facebook, YouTube +: How Social media Outlets Impact Digital Terrorism and Hate (May 13, 2009).

²⁶ See, e.g., Warner, *supra* note 11; Herbert, *supra* note 1; Rich, *supra* note 18; Rich, *supra* note 11.

²⁷ This Article adopts a *critical realist* (or *law and mind sciences*) approach, which relies on the insights of the mind sciences to construct a more realistic model of human behavior upon which to base law and legal theory. For other representative work in the critical realist project, see Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 311 (2004); Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 INDIANA L.J. 1333 (2010); Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Jon Hanson & David

behavioral research seriously casts doubt on the theoretical foundations of current approaches to regulating firearms and to protecting our racial minority citizens: rational shooters and conscious racists. If we are to achieve our goal of ensuring the safety of African Americans and other minorities, we cannot afford to ignore the evidence anymore; the law must react to the truth about what actually underlies human behavior.

Part I of this Article begins with a brief overview of the current landscape concerning the Second Amendment and race-based violence. The discussion offers compelling evidence that we are in a moment in which firearm possession and use by private citizens is increasingly accepted and embraced by government actors and the public at large. The analysis also suggests that while there is some evidence of a rise in hate groups and racially motivated hate crimes in recent months and years, the outward prejudice that was once commonplace in the United States has actually decreased significantly over the last several decades and has grown to be viewed as unacceptable and immoral. Nonetheless, racial minorities—specifically African Americans—continue to inhabit notably disadvantaged positions compared to whites in the contexts of health, employment, housing, education, and criminal justice.

This section serves as a backdrop for an investigation into the dominant narratives of prejudice and firearm rights mentioned above, by which both racial bias and gun deaths are understood to result from bad choices, poor self-control, and rotten dispositions. These narratives are reflected in popular culture, propel key policy debates, and inform our laws.

Part II then explores recent scientific research on implicit racial bias that undermines conceptions of human behavior as rational and consciously willed. Today, the major threat to African Americans is not, as Herbert has argued, “the same old filthy racism that has been there all along.”²⁸ Despite the large amount of attention that bigoted murders garner, in reality, incidents like those perpetrated by von Brunn and Poplawski are rare. The far more pressing peril for blacks stems from an unconscious set of racial associations—held by the

Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*]; Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*].

²⁸ Herbert, *supra* note 10.

majority of Americans—that drive discriminatory and potentially life-threatening actions largely beyond people’s awareness.

Most pertinent to this Article, in several important experiments involving firearm simulations in which participants were required to shoot people carrying weapons and hold their fire with respect to unarmed individuals, subjects who demonstrated little or no explicit prejudice nonetheless acted in a racially biased manner: they did not do the rational thing and shoot all of the threatening individuals with guns and spare all of the innocents; they disproportionately and erroneously shot unarmed blacks and held their fire when they saw armed whites. Other research has shown, however, that particular shooter training may allow people who carry implicit racial bias to avoid its effects.

This leads to a troubling set of implications, detailed in Part III: although police officers in a number of jurisdictions receive significant decisional shooting practice, which appears to aid in controlling for implicit bias, as this Article documents in a state-by-state survey included in Appendix A, most members of the public who buy guns are not similarly compelled to undergo meaningful firearm training. In a nation with expanding public gun culture and decreasing government regulation—where criminal enforcement may be shifting from the professional police force to everyday citizens protecting their homes and families—the danger is greatly magnified. People who carry implicit bias against racial minorities, but who lack the training to counteract their bias when it comes to behavior, stand as a grave threat to racial minorities.

Part IV of the Article concludes with a policy proposal for state and local governments to address the developments and dynamics discussed in the previous sections. This Part offers a warning that if we continue to focus our attention on the menace of paranoid white supremacists enflamed by gun regulation fear mongering, we will not only ignore a far more potent danger to our citizenry but may also be prompted to pursue courses of action that imperil important basic rights, like freedoms of speech and association. The least invasive, most effective, and most politically realistic approach to eliminating the danger of racially biased gun use is for states to require ongoing firearm-simulation training and shooting practice designed to improve accuracy by disrupting the influence of automatic stereotypes.

I

RACISM AND GUN RIGHTS

A. *A Changing Landscape*

As discussed previously, one of the purported motivating factors for those perpetrating hate crimes or joining hate groups is apprehension over gun regulations. In the words of the Department of Homeland Security, the “[p]roposed imposition of firearms restrictions and weapons bans [is] likely [to] . . . attract new members into the ranks of rightwing extremist groups, as well as potentially spur some of them to begin planning and training for violence.”²⁹

This naturally leads to questions as to the current state of firearms regulations in the United States. Are additional restrictions being proposed by legislatures? Are new bans likely to be upheld by courts? Are members of the public supportive of more gun controls?

The following pages take up those issues and describe an environment in which gun advocates have enjoyed remarkable success. In particular, the focus is on (1) the recently articulated individual rights approach to the Second Amendment, (2) a thriving American gun culture, (3) ever-expanding gun ownership, and (4) the significant use of firearms by citizens in self-defense.

Thus, although the 2008 election stoked fears of a new restrictive governmental approach to guns, and President Obama continues to be assailed as a major threat to Second Amendment rights, the United States is experiencing a period of growing acceptance of guns in all aspects of life. Indeed, we are increasingly witnessing a shift from public criminal law enforcement by police forces to private-citizen enforcement.

The shift may be traced, in part, to the pervasiveness of a shared narrative—discussed in Part I.B—that most adult Americans, as rational actors, are in complete, conscious control of their shooting decisions and that bad shooting outcomes stem from the evil dispositions and poor choices of a small minority. This narrative is challenged by the psychological evidence presented in Part II on the implicit (unconscious) cognitive processes that influence gun use, which leads to the conclusion that the broad expansion of gun rights and culture and the shift to private-citizen enforcement, documented in the pages that follow, present an acute danger.

²⁹ U.S. DEP’T OF HOMELAND SEC., *supra* note 2, at 3.

1. *Guns*

a. *A New View of the Second Amendment*

Until 2007, no federal court had ever overturned a gun ownership restriction as violating the Second Amendment.³⁰ “[T]he right of the people to keep and bear Arms”³¹ was understood as a collective right: the purpose of the Second Amendment was to limit Congress’s ability to assert too much power over the several states by protecting the well-regulated militia as a potential bulwark against the national army.³² Indeed, prior to the decision of the D.C. Circuit Court of Appeals, there were only three instances in which the Supreme Court addressed the Second Amendment, and each time the Court construed the amendment as protecting a collective right as opposed to an individual right.³³ This interpretation was broadly accepted for nearly a century, and no legal articles promoting the individual interpretation appeared until 1960.³⁴

In *District of Columbia v. Heller*, however, the Supreme Court upheld the D.C. Circuit’s invalidation of sections of Washington’s firearm restrictions, announcing that under the Second Amendment people have an individual right to bear arms.³⁵ Justice Scalia, writing for the majority, grounded his originalist analysis of the amendment in the primary “right of law-abiding, responsible citizens to use arms in defense of hearth and home.”³⁶

Having not considered the constitutionality of existing municipal and state firearms regulations in *Heller*, the Supreme Court took up the issue in *McDonald v. City of Chicago*, with the majority incorporating the Second Amendment right articulated in *Heller*

³⁰ See Cass Sunstein, *America’s 21st-Century Gun Right*, BOSTON GLOBE, June 26, 2008; *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff’d sub nom. District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

³¹ U.S. CONST. amend. II.

³² See *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting).

³³ See *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Miller*, 307 U.S. 174 (1939).

³⁴ See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4–5 (2000) (referencing Stuart R. Hays, *The Right to Bear Arms, a Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381 (1960)).

³⁵ *Heller*, 128 S. Ct. at 2797.

³⁶ *Id.* at 2821; see also *id.* at 2817 (“[T]he inherent right of self-defense has been central to the Second Amendment right.”).

against the states through the Fourteenth Amendment.³⁷ However, the Court did not offer much further clarification on the particular types of firearms regulations that are now potentially unconstitutional—aside from complete bans on the use of handguns in the home for self-defense—or the standard of review for assessing such regulations.³⁸

In *Heller*, the majority made clear that the right to bear arms is not a license “to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose” and that governmental entities retain some ability to regulate arms³⁹—a position that it reiterated in *McDonald*.⁴⁰ However, in just the first eighteen months following the Supreme Court’s decision in *Heller*, there were over 190 challenges to firearms laws and prosecutions based on the Second Amendment.⁴¹ These included challenges to laws banning individuals who had been indicted from possessing firearms,⁴² prohibiting carrying loaded guns in public,⁴³ and banning the sale of particularly dangerous weapons,⁴⁴ among other things. The landscape is still in flux, but whatever further clarification the Supreme Court offers on the remaining authority of states and

³⁷ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010). Although *McDonald* was a 5-to-4 decision, the outcome was expected by legal scholars. See, e.g., Bret Boyce, *Heller, McDonald and Originalism*, 2010 CARDOZO L. REV. DE NOVO 2; see also Adam Liptak, *Justices Will Weigh Challenges to Gun Laws*, N.Y. TIMES, Sept. 30, 2009, <http://www.nytimes.com/2009/10/01/us/01scotus.html> (“Most legal scholars expect the court to apply the Second Amendment to the states.”); Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE L. REV. 185, 199 (2008).

³⁸ See *McDonald*, 130 S. Ct. at 3044. The concurring opinion in *United States v. McCane* summarized the challenge thusly: “Knowing the meaning of the Second Amendment right and having identified its individual nature, the issue becomes what limits the government may place on the right. Indeed, this is where the Second Amendment rubber meets the road.” No. 08-6235, slip. op. at 4 (10th Cir. July 28, 2009) (Tymkovich, J., concurring).

³⁹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816 (2008).

⁴⁰ *McDonald*, 130 S. Ct. at 3047 (“Despite municipal respondents’ doomsday proclamations, incorporation does not imperil every law regulating firearms.”).

⁴¹ Brief of Amici Curiae Brady Center to Prevent Gun Violence, The International Association of Chiefs of Police, The International Brotherhood of Police Officers, and The National Black Police Association in Support of Neither Party at 3, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) [hereinafter Brief of Amici Curiae Brady Center].

⁴² See, e.g., *United States v. Arzberger*, 592 F. Supp. 2d 590, 602 (S.D.N.Y. 2008).

⁴³ See, e.g., *Palmer v. District of Columbia*, No. 09-cv-1482 (D.D.C. filed Aug. 6, 2009).

⁴⁴ See, e.g., *Peña v. Cid*, No. 2:09-cv-01185 (E.D. Cal. filed Apr. 30, 2009).

localities to regulate firearm possession in the wake of *Heller* and *McDonald*, individual gun rights seem likely to continue to expand.

b. A Thriving Gun Culture

Gun culture is flourishing in the United States. Nowhere is that more clear than in the significant shift toward (re)incorporating guns into everyday life.⁴⁵ The Supreme Court's opinions in *Heller* and *McDonald* have prompted state and local governments to reconsider their existing firearm regulations, but other changes have emerged as a result of small-scale lobbying by gun rights advocates and general shifts in public attitudes.⁴⁶ While twenty years ago only six states had right-to-carry laws, today over forty states have such provisions.⁴⁷ Firearms are finding their way into spaces that for decades—and, in some cases, much longer—were off limits. Sanctuaries have become gun-friendly zones. Twenty states now allow firearms in churches, and a number have recently cut back on other place restrictions.⁴⁸ Indiana passed legislation in January 2010 that now bars private employers from preventing employees from having guns in their automobiles on company property.⁴⁹ In Arizona, the Governor recently signed a bill allowing people to carry concealed guns into establishments that serve alcohol, making the state the forty-first with such a provision.⁵⁰

On the national level, an amendment to the annual defense authorization bill allowing a gun owner who is issued a permit in one state to carry a concealed weapon into another state without holding a separate permit was defeated by just two votes in the Senate in July 2009.⁵¹ This defeat proved a rare setback in a year with several major victories for firearm enthusiasts. President Obama, for example, recently signed legislation allowing people to bring firearms into

⁴⁵ See, e.g., Katharine Q. Seelye, *Pastor Urges His Flock to Bring Guns to Church*, N.Y. TIMES, June 25, 2009, <http://www.nytimes.com/2009/06/26/us/26guns.html>.

⁴⁶ See Ian Urbina, *Fearing Obama Agenda, States Push to Loosen Gun Laws*, N.Y. TIMES, Feb. 23, 2010, <http://www.nytimes.com/2010/02/24/us/24guns.html>.

⁴⁷ Press Release, National Rifle Association Institute for Legislative Action, *Bi-Partisan Congressional Majority Moves to Restore Second Amendment in National Parks* (May 20, 2009).

⁴⁸ Seelye, *supra* note 44.

⁴⁹ See Urbina, *supra* note 45.

⁵⁰ Amanda Lee Myers, *Guns Allowed in Arizona Bars Starting Wednesday*, ABC NEWS (Sept. 29, 2009), <http://abcnews.go.com/US/wireStory?id=8702911>.

⁵¹ See Bernie Becker & David M. Herszenhorn, *Gun Rights Expansion Fails in Senate*, N.Y. TIMES, July 22, 2009, <http://www.nytimes.com/2009/07/23/us/politics/23guns.html>.

national parks⁵² and permitting passengers to carry firearms on Amtrak.⁵³ Advocates in Congress have more permissive firearm legislation on tap for the future.⁵⁴ And a number of members of the Senate and the House have even defended bringing guns to public forums, like the town hall meetings on health care reform that President Obama conducted last year.⁵⁵

One exception to the general expansion of gun tolerance in the United States, which analysis in Part II.B helps to explain, is that firearm restrictions at schools continue to be fairly strict.⁵⁶ Guns are currently prohibited at schools in thirty-eight states and in the District of Columbia,⁵⁷ and proposed legislation to permit students to carry firearms at colleges has been derailed in the twenty or so states in which it has been introduced over the last three years.⁵⁸ Yet, despite the general resistance to allowing firearms in schools, it is a testament to the growing strength of American gun culture that, after recent mass shooting tragedies at Virginia Tech and elsewhere, many

⁵² *Obama Signs New Rules for Credit Cards into Law*, MSNBC (May 22, 2009), <http://www.msnbc.msn.com/id/30884011/>. Although public hunting is impermissible under the national parks' founding legislation, there have also been recent attempts to remove the prohibition. See *Elk Hunting in the Badlands*, N.Y. TIMES, July 7, 2009 <http://www.nytimes.com/2009/07/08/opinion/08wed4.html>. In 2009, for instance, Senator Byron Dorgan introduced a rider to an appropriations bill for the Department of Interior in which he provided for a "common sense" public hunt in Theodore Roosevelt National Park in North Dakota. *Id.*

⁵³ See Chad Pergram, *President Signs Bill That Allows Gun-Slinging AMTRAK Passengers to Be Locked in Boxes*, The Speaker's Lobby, FOX NEWS.COM (Dec. 16, 2009), <http://congress.blogs.foxnews.com/2009/12/16/president-signs-bill-that-allows-gun-slinging-amtrak-passengers-to-be-locked-in-boxes/> (noting a clerical error in the legislation).

⁵⁴ See Becker & Herszenhorn, *supra* note 51 ("[John] Thune, [Republican of South Dakota] Senator Tom Coburn, Republican of Oklahoma, and other pro-gun lawmakers had said they intended to bring many provisions seeking to expand gun rights to the Senate floor this year.").

⁵⁵ See Jim Galloway, *Gingrey on Guns at Health Care Debates: "I Have No Fear,"* Political Insider, AJC.COM (Aug. 17, 2009), <http://blogs.ajc.com/political-insider-jim-galloway/2009/08/17/phil-gingrey-on-guns-at-health-care-debates/> (quoting Representative Phil Gingrey); "Meet the Press" Transcript for August 16, 2009, MSNBC (Feb. 4, 2010), http://www.msnbc.msn.com/id/32420049/ns/meet_the_press/ (quoting Senator Tom Coburn).

⁵⁶ See *infra* text, accompanying notes 64–69.

⁵⁷ Marisol Bello, *Push to Permit Guns on Campus*, USA TODAY, Feb. 15, 2008.

⁵⁸ See Urbina, *supra* note 46.

individuals have argued publicly that the incidents reveal the need for more armed citizens in the public sphere, not fewer.⁵⁹

On the whole, despite many warnings by the National Rifle Association and other groups about pending gun regulation if John McCain were to lose the 2008 presidential election,⁶⁰ President Obama has done little to crack down on gun ownership since taking office.⁶¹ The Brady Center to Prevent Gun Violence characterized Obama's first-year record on gun control as an "abject failure," pointing to his unwillingness to strengthen background checks, ban assault weapons, and oppose concealed carry.⁶²

Part of the reason for President Obama's hesitance may have to do with changing public perceptions on gun ownership. The NRA has experienced a thirty percent increase in its membership rolls since Obama was elected in November 2008.⁶³ In fact, the Pew Research Center's most recent data on public opinions of gun ownership show that a record high percentage of Americans believe that it is more important to protect gun owners' rights than it is to control gun ownership.⁶⁴ The support for each side is near equal with forty-five percent of respondents choosing gun owners' rights and forty-nine percent favoring control of gun ownership.⁶⁵ These data suggest a sharp change in public opinion from the previous year in which fifty-eight percent of respondents said gun control was more important than the rights of gun owners, and only thirty-seven percent of respondents reported the opposite view.⁶⁶

For many, gun rights are not only valued but also seem to elicit a rarefied fervor that is unique among the various constitutional protections. Ken Pagano, pastor of the New Bethel Church in Louisville, Kentucky, for example, recently invited churchgoers to bring their weapons to services to "celebrate our rights as

⁵⁹ See, e.g., John Lott & Maxim Lott, *More Guns, Not Less, Would Prevent Shooting Massacres*, FOX NEWS.COM (Aug. 29, 2007), <http://www.foxnews.com/story/0,2933,294954,00.html>.

⁶⁰ See, e.g., GUNBANOBAMA, *supra* note 19.

⁶¹ See Herbert, *supra* note 1; Urbina, *supra* note 46.

⁶² BRADY CENTER TO PREVENT GUN VIOLENCE, *PRESIDENT OBAMA'S FIRST YEAR: FAILED LEADERSHIP, LOST LIVES* 1–2 (2010).

⁶³ Seelye, *supra* note 45.

⁶⁴ PEW RESEARCH CENTER, *AMERICANS NOW DIVIDED OVER BOTH ISSUES: PUBLIC TAKES CONSERVATIVE TURN ON GUN CONTROL, ABORTION* (2009).

⁶⁵ *Id.*

⁶⁶ *Id.*

Americans!”⁶⁷ Following an opinion by the Wisconsin Attorney General that “citizens who openly carry firearms should not be cited for disorderly conduct,” over two hundred people, half of them armed, celebrated with a picnic at a public park in La Crosse County, Wisconsin.⁶⁸ Other open-carry picnics, parades, parties, and rallies have occurred across the country.⁶⁹

The transformation in public perceptions, however, goes beyond popular feelings about owning or carrying firearms. There also appears to be a shift in Americans’ opinions about the *use* of guns.

As a result, more and more states have been implementing laws that expand the set of circumstances in which a citizen can legitimately use a firearm against a person he perceives to be intruding into his home. In general, these “castle doctrine” laws allow an individual to use reasonable force, including deadly force, against an attacker and eliminate any duty to retreat to safety. These laws have become increasingly popular in the last five years, with over fifteen states adopting some form of the “castle doctrine” since 2005.⁷⁰ Although the exact provisions of these statutes vary from state to state, some versions remove the duty to retreat altogether, whether in the home or outside of it, and may even abandon the requirement that a person be in reasonable fear of his life before resorting to lethal force.⁷¹ Oklahoma’s “Make My Day” statute, for instance, eliminates a person’s duty to retreat if “attacked in any . . . place where he or she has a right to be” and gives that person the “right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another *or to prevent the commission of a forcible felony.*”⁷² The result is that an armed citizen can find himself in a situation where he may shoot someone to death outside of his home, without any belief that his life is in danger, free from criminal liability.

⁶⁷ Seelye, *supra* note 45.

⁶⁸ *Hamburgers, Hot Dogs, Brats and Guns at Picnic*, MSNBC (May 14, 2009), <http://www.msnbc.msn.com/id/30747452/>.

⁶⁹ Eartha Jane Melzer, *Gun Rights Supporters Pair Weekend Picnic with Weaponry*, MICH. MESSENGER, June 29, 2009.

⁷⁰ Christopher Reinhart, *Castle Doctrine and Self-Defense* (Jan. 17, 2007), <http://www.cga.ct.gov/2007/rpt/2007-R-0052.htm>.

⁷¹ See, e.g., OKLA. STAT. tit. 21, § 1289.25 (2010).

⁷² *Id.* (emphasis added).

Overall, while the NRA and other groups have enjoyed great success in expanding gun rights on numerous fronts, their strong advocacy continues. In recent years, the NRA has been ranked as the most powerful lobbying organization by lawmakers and their staffers, and with a current membership of nearly four million, it remains one of the most influential voices in Washington.⁷³ In addition to sponsoring lawsuits seeking to overturn state and local gun regulations and attempts to expand self-defense laws, its current legislative agenda includes a campaign to prevent the reinstatement of the federal semiautomatic assault weapons ban, which expired in 2004.⁷⁴ The NRA has also continued its efforts to alter the gun control debate by sponsoring seminars for scholars; providing research grants; distributing books and law review articles to libraries, public defender services, and others; and conducting student essay contests.⁷⁵ Building support for its positions by shaping knowledge production and consumption at all levels, the organization is positioned to see further gains for pro-gun culture.

c. More Guns, More Gun Ownership, More Gun Permits

The real story of the NRA revolution has been not only about expanding rights and public perceptions about guns but also about expanding gun ownership.

Buying guns has been normalized in the United States; today, firearms are just another commodity. There are five states in which you will have better luck finding a gun dealer than a gas station.⁷⁶ And if you prefer not to go to a gun store, you can try one of the several thousand gun shows held each year.⁷⁷ Or, better yet, head

⁷³ *About Us*, NAT'L RIFLE ASS'N, <http://home.nra.org/#/home> (last visited Oct. 10, 2010).

⁷⁴ *Id.*

⁷⁵ *Research: Special Funds*, NRA CIVIL RIGHTS DEF. FUND, <http://www.nradefensefund.org/research.aspx> (last visited Oct. 10, 2010). David T. Hardy, for example, was provided with a grant of \$15,500 for writing a book review in the *William & Mary Bill of Rights Journal* and an article in the *Thomas Jefferson Law Review*. *Id.*

⁷⁶ VIOLENCE POLICY CTR., AN ANALYSIS OF THE DECLINE IN GUN DEALERS: 1994 TO 2007 6 (2007), available at <http://www.vpc.org/studies/dealers07.pdf> (The states are Alaska, Idaho, Montana, Oregon, and Wyoming.).

⁷⁷ See U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., EVALUATION AND INSPECTIONS DIV., THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES' INVESTIGATIVE OPERATIONS AT GUN SHOWS i (2007), available at <http://www.justice.gov/oig/reports/ATF/e0707/final.pdf>.

over to Max Motors, a car dealership in Butler, Missouri, where owner Mark Muller recently offered a voucher for an AK-47 with every truck purchase, after having great success with a similar promotion, involving coupons for handguns, the previous year.⁷⁸ Travel to Kennesaw, Georgia, and you will find a firearm in every single home as a result of a law requiring heads of households to own at least one firearm.⁷⁹ For Kennesaw residents—and many other Americans—a gun is just another basic home safety tool, like a smoke detector or fire extinguisher. The best current estimate is that there are around 200 to 250 million firearms owned by private individuals in the United States.⁸⁰

In spite of a severe recession, Americans bought more guns and ammunition between October 2008 and October 2009 than they ever had before.⁸¹ Indeed, during that period, firearms dealers sold twelve billion rounds of ammunition, which would give every man, woman, and child in the United States thirty-eight bullets each.⁸² As a result, the U.S. Treasury Department reported a forty-two percent increase in the taxes collected on gun sales and a forty-nine percent increase on sales of ammunition.⁸³

The upward trend in sales mirrored a surge in new firearm licenses and permits.⁸⁴ From the launch of the National Instant Criminal Background Check System (NICS) in 1998 until 2005, the total number of background checks performed in any given year deviated no more than five percent from the previous year.⁸⁵ However, from 2006 to 2009, background checks increased each year by double digit percentages.⁸⁶

⁷⁸ See Richard S. Chang, *Car Dealer Offers AK-47 with Purchase*, N.Y. TIMES, July 21, 2009, <http://wheels.blogs.nytimes.com/2009/07/21/car-dealer-offers-ak-47-with-purchase/>.

⁷⁹ See Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBS. 15 (1988).

⁸⁰ See Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1045 (2009).

⁸¹ See David A. Fahrenthold & Fredrick Kunkle, *U.S. Sees Shortage of Ammunition*, WASH. POST, Nov. 3, 2009.

⁸² See *id.*

⁸³ See *id.*

⁸⁴ *Soaring Gun Sales in Arizona: Planning for the Worst*, ECONOMIST, June 4, 2009; John O'Connor, *Illinois Gun Sales Soar, up 39 Percent*, CHI. TRIB., Dec. 4, 2008.

⁸⁵ See *National Instant Criminal Background Check System (NICS)*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/hq/cjisd/nics.htm> (last visited Jun. 29, 2010); *Total NICS Background Checks*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/hq/cjisd/nics/nics_checks_total.htm (last visited June 29, 2010); Urbina, *supra* note 46.

⁸⁶ See *Total NICS Background Checks*, *supra* note 85.

d. Gun Use: Private Enforcers?

Legislatures and courts have granted Americans broad new firearm rights, and Americans are arming themselves more than ever, but how much are private citizens actually using their guns? The answer appears to be quite a lot.

Although estimates vary, one of the most widely cited studies calculated that Americans employ guns to defend themselves approximately 2.5 million times per year—or approximately 6850 times each day.⁸⁷ In another study, it was found that burglars are confronted by armed homeowners approximately half a million times each year.⁸⁸

In many incidents in which a firearm is brandished, no shot is fired, but in many others, triggers are pulled with expected results. Indeed, “[a]n American burglar’s risk of being shot while invading an occupied home is greater than his risk of going to prison.”⁸⁹ Overall, estimates suggest that, in the United States, there are over 36,000 firearm-related deaths and over 82,000 nonfatal firearm-related injuries each year.⁹⁰ Blacks make up fifty-four percent of the victims of nonfatal gunshot wounds and fifty-four percent of the victims of fatal gunshot wounds.⁹¹

⁸⁷ See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 175 (1995) (about a quarter of these incidents involve the actual discharge of a weapon); District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (Breyer, J., dissenting) (citing Kleck and Gertz study); see also Brief of the International Law Enforcement Educators and Trainers Association (ILEETA) at 14, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290) (“There have been 13 major surveys regarding the frequency of defensive gun use (DGU) in the modern United States. The surveys range from a low of 760,000 annually to a high of three million.”); PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 62–63 (1996) (estimating an annual figure of 1,460,000); Tom Smith, *A Call for a Truce in the DGU War*, 87 J. CRIM. L. & CRIMINOLOGY 1462 (1997) (The National Opinion Research Center puts the annual figure in the range of 256,500 to 1,210,000.); U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY, 1992–2005: CONCATENATED INCIDENT-LEVEL FILES (2005).

⁸⁸ See Robin M. Ikeda et al., *Estimating Intruder-Related Firearm Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363, 367 (1997).

⁸⁹ Brief of the International Law Enforcement Educators and Trainers Association (ILEETA) at 10, District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

⁹⁰ See MARIANNE W. ZAWITZ & KEVIN J. STROM, DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FIREARM INJURY AND DEATH FROM CRIME, 1993–97 2 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fidc9397.pdf>.

⁹¹ See *id.*

With the Supreme Court and states enlarging the scope of Second Amendment rights and an ever-expanding gun culture in the United States, it is quite possible that the use of firearms by private individuals will significantly increase. In fact, the coming decades may demonstrate an ongoing shift of criminal enforcement from police forces to armed citizens. Already, private citizens shoot and kill more than 2.5 times as many criminals as members of the police do.⁹² And much of the argumentation both before the Supreme Court and in popular discourse in support of pro-gun positions has been on the vital need for every adult citizen to have the means to defend himself without having to rely on ineffective state mechanisms at critical moments. As Nelson Lund has explained, the purpose of the Second Amendment “is to enable American citizens to defend themselves, not against direct oppression by the government, but against oppression from which the government fails to protect them. . . . [T]he police do not and cannot protect law-abiding citizens from criminal violence.”⁹³

A number of briefs filed in *McDonald* made exactly that point, asserting that a shift to private citizen enforcement must be made because the police (1) are corrupt and brutal,⁹⁴ (2) are ineffective because of staffing shortages and scandals,⁹⁵ (3) “have no legal or constitutional duty to rescue citizens from violence,”⁹⁶ (4) “despite best efforts . . . rarely arrive in time to prevent or interrupt a crime,”⁹⁷ and (5) are overwhelmed by great increases in 911 calls.⁹⁸ As the NRA summed up, “Overwhelming evidence shows that [citizen-owned] firearms, including handguns, are the most effective and safe means of deterring burglars and other home invaders.”⁹⁹ In referring to “self-defense” not as a “subsidiary interest,” as Justice Breyer had

⁹² See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 111–16, 148 (1991).

⁹³ NELSON LUND, A PRIMER ON THE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS 13 (2002).

⁹⁴ Brief of Buckeye Firearms Foundation at 25, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

⁹⁵ *Id.* at 15–24.

⁹⁶ Brief Amicus Curiae of the Heartland Institute in Support of Petitioners at 3, 10–11, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

⁹⁷ *Id.* at 12.

⁹⁸ *Id.*

⁹⁹ Reply Brief for Respondents, The National Rifle Association of America, Inc. et al. in Support of Petitioners at 23–24, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

characterized it,¹⁰⁰ but as “the central component of the right [to bear arms] itself,”¹⁰¹ the Supreme Court majority in *Heller* provided the legal foundation for just such a shift toward private-citizen enforcement.

2. *Racism and Disparate Outcomes*

At the same time that there have been significant changes in the United States concerning opinions, policies, laws, and practices relating to firearms, there has also been important shifts on matters of race. In the first half of the last century, prejudice against minorities was out in the open—it was on water fountain signs, typed into home leases, and peppered in casual conversations. Today, however, overt racism is strongly stigmatized and tends to be roundly condemned when it emerges.¹⁰² As Antony Page and Michael J. Pitts summarize,

Sixty years ago white Americans tended to believe that African-Americans were their intellectual inferiors. More recently, only a small fraction make this claim. In 1945, 55% of white respondents asserted that whites should be given the first chance at any job as opposed to giving “Negroes” as good a chance; by 1972, only 3% agreed. In 1957, a majority of Americans indicated they would not cast a ballot for an African-American President, but by 2007 it was only 7%.¹⁰³

Indeed, with the election of Barack Obama as the first African American President in 2008, a common sentiment has emerged that we have entered (or are entering) a “post-racial” era.¹⁰⁴ As Obama explained in his 2004 Democratic National Convention speech, “There’s not a black America and white America and Latino America and Asian America; there’s the United States of America.”¹⁰⁵ Our laws have been purged of racial language and now actively bar

¹⁰⁰ *Heller*, 128 S. Ct. at 2866 (Breyer, J., dissenting).

¹⁰¹ *Id.* at 2801 (majority opinion).

¹⁰² See PAUL M. SNIDERMAN & THOMAS PIAZZA, BLACK PRIDE AND BLACK PREJUDICE 6–8 (2002); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009); Antony Page & Michael J. Pitts, *Poll Workers, Election Law, and the Problem of Implicit Bias* 19 (2009) (unpublished manuscript) (on file with author).

¹⁰³ See Page & Pitts, *supra* note 102, at 19 (citations omitted).

¹⁰⁴ See Cho, *supra* note 102, at 1591–93.

¹⁰⁵ President Barack Obama, Keynote Address at the 2004 Democratic National Convention (July 27, 2004) (transcript available at *Obama News and Speeches*, BARACK OBAMA.COM (July 27, 2004), http://www.barackobama.com/2004/07/27/keynote_address_at_the_2004_de.php).

discrimination based on race.¹⁰⁶ And the Supreme Court has increasingly embraced a notion that the regime of color consciousness that was once necessary to address historical discrimination against minorities is no longer necessary or justifiable and that race-neutral universalism must be the overarching concern for our legal system.¹⁰⁷

Yet, despite the Supreme Court's rhetoric and the optimistic forecasts of certain pundits, racially charged incidents have continued to crop up, and disparate outcomes based on race have persisted. Much of the focus by journalists, activists, and government policy makers has been on the former. However, as discussed in the sections that follow, although it is important not to minimize examples of continued overt bigotry in the United States, the more significant and widespread threat to African Americans likely happens in the shadows of everyday interactions.

This discussion leads to a set of important questions: Why is our attention and energy on the issue of race in America largely focused on hate crimes and groups when disparate outcomes in education, housing, employment, health, and criminal justice seem to be a more significant problem? What is the basis or justification for not addressing these outcomes and for relying on colorblind approaches?

The answer, as this Article argues in Part I.B, lies in the power of a widely shared model of human behavior that assumes that most Americans are rational, autonomous choosers with control over their environments and destinies—the same model that underlies our current policies and opinions regarding guns. As reviewed in Part II, the most recent scientific research suggests that this model is badly flawed.

a. Hate Groups and Hate Crimes

There is some evidence that the election of the nation's first black President—along with poor economic conditions and continuing concerns over immigration—has caused an increase in explicit bigotry against minorities.¹⁰⁸ But a careful reading of the data

¹⁰⁶ See, e.g., Voting Rights Act, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965); Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964).

¹⁰⁷ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (arguably the first “post-racial” Supreme Court opinion); see also Cho, *supra* note 102, at 1611–21.

¹⁰⁸ See, e.g., U.S. DEP'T OF HOMELAND SEC., *supra* note 2; Mara Schiavocampo, *Homegrown Hate Groups Increase in Number*, MSNBC (June 10, 2009), <http://www.msnbc.msn.com/id/30876593/>.

suggests that the magnitude of the threat may be smaller than it would seem.

A recent assessment by the U.S. Department of Homeland Security provided support for the view that right-wing extremism (particularly in the form of white supremacist groups and violent antigovernment groups) is on the rise,¹⁰⁹ warning that Internet and other technological developments that facilitate recruitment and collaboration and allow greater access to training and tactical information make the threat significantly graver than it was in the 1990s.¹¹⁰ In 1995, there was one extremist Web site online; today, the Simon Wiesenthal Center has identified “some 10,000 problematic hate and terrorist websites, hate games and other internet postings.”¹¹¹ Yet, while the numbers do suggest a greater public presence for those peddling hate, the figures do not necessarily imply an increase in bigotry, given general expansions in Internet use by all individuals and groups over the last fifteen years.

The Southern Poverty Law Center, which has been keeping data on hate groups for almost thirty years, found that the number of such groups hit an all-time high in 2008, up four percent from 2007 and fifty-four percent since 2000.¹¹² Again, though, the numbers are difficult to interpret and may not suggest an increased threat to minorities but rather a greater current online presence by hate groups than ten years ago—making them easier to spot—and more effective tracking by monitors. Moreover, although some groups experienced growth in the last surveyed year, others saw declines in chapters and overall membership. The Ku Klux Klan, for example, which had seen its membership decreasing since 2000, experienced an expansion in 2008 with the formation of thirty-one new chapters across the United States, while thirteen neo-Nazi chapters closed over the course of the year.¹¹³

Similar dynamics seem to be at work with respect to hate crimes. Although it is very difficult to draw clear trends from FBI hate crime statistics because of the variability of reporting customs across jurisdictions and changing crime identification practices over time,

¹⁰⁹ See U.S. DEP’T OF HOMELAND SEC., *supra* note 2, at 9.

¹¹⁰ See *id.*

¹¹¹ Press Release, Simon Wiesenthal Center, *supra* note 25.

¹¹² See DAVID HOLTHOUSE, S. POVERTY LAW CTR., INTELLIGENCE REPORT: THE YEAR IN HATE (2009), available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=1027> (finding 926 hate groups in 2008).

¹¹³ See *id.*

the most recent data suggest an increase in the number of hate crimes committed against blacks.¹¹⁴ From 2007 to 2008, there was an eight percent increase in the number of attacks on blacks, and blacks now suffer 72.6% of race-motivated crimes.¹¹⁵

As commentators have pointed out, because of reporting failures—at the individual, precinct, and state level—the absolute number of hate crime incidents reported by the FBI is likely to be significantly understated.¹¹⁶ In 2008, for example, Alabama reported exactly eleven incidents, Mississippi reported four, and Georgia reported nine.¹¹⁷ Given the long history of discrimination, intimidation, and violence in these three states and the size of the implicated population, it seems highly implausible that there were only twenty-four hate crime incidents over the course of the year.¹¹⁸

Still, the ultimate magnitude of the threat to minorities is difficult to assess. A number of experts have argued that the danger of overt racist violence is actually quite minimal. Phyllis B. Gerstenfeld, for example, has characterized hate-fueled violence as “terrible but uncommon,”¹¹⁹ and Eric Hickey has noted that “[t]o date, acts of hate

¹¹⁴ *Hate Crimes Against Blacks, Religious Groups Rise*, USA TODAY, Nov. 23, 2009. There were a total of 7783 hate crimes in 2008, which was an increase of two percent from the previous year. UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2008: INCIDENTS AND OFFENSES (2008) [hereinafter HATE CRIME STATISTICS, 2008], available at <http://www2.fbi.gov/ucr/hc2008/documents/incidentsandoffenses.pdf>; UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2007: INCIDENTS AND OFFENSES (2007) [hereinafter HATE CRIME STATISTICS, 2007], available at <http://www2.fbi.gov/ucr/hc2007/downloadablepdfs/incidentsandoffenses.pdf>.

¹¹⁵ HATE CRIME STATISTICS, 2008, *supra* note 114; HATE CRIME STATISTICS, 2007, *supra* note 114.

¹¹⁶ Deborah Tedford, *FBI Report Notes Rise in Hate Crimes*, NPR, Nov. 23, 2009, <http://www.npr.org/templates/story/story.php?storyId=120715771>.

¹¹⁷ 2008 *Hate Crime Statistics, Table 12*, FED. BUREAU OF INVESTIGATION (2008), http://www2.fbi.gov/ucr/hc2008/data/table_12.html.

¹¹⁸ See Tedford, *supra* note 116. To provide some perspective, in 2008, New Jersey reported 744 incidents, Massachusetts reported 333, and Michigan reported 560. 2008 *Hate Crime Statistics, Table 12*, *supra* note 117. According to the Southern Poverty Law Center, there are twenty-nine percent more hate groups operating in Alabama, Georgia, and Mississippi than in Massachusetts, Michigan, and New Jersey. *Hate Map, Active U.S. Hate Groups*, S. POVERTY LAW CTR., <http://www.splcenter.org/intel/map/hate.jsp> (last visited Oct. 10, 2010).

¹¹⁹ Phyllis B. Gerstenfeld, *Don't Overreact*, Room for Debate, N.Y. TIMES, June 11, 2009, <http://roomfordebate.blogs.nytimes.com/2009/06/11/hate-crimes-and-extremist-politics/> (“[A] very large majority of those who attack others because of their victims’ race . . . are not hard-core bigots who join supremacist groups or expound their views in websites or manifestos.”).

murder . . . are sporadically committed by only a handful of offenders.”¹²⁰

Nonetheless, with several high profile incidents in the wake of President Obama’s election, including the von Brunn attack outside the Holocaust Museum, and threats to Obama himself, overt racism has gained a great deal of popular attention.¹²¹ As detailed earlier, it has elicited significant coverage by the media, as well as from government policy makers.¹²² The Obama Administration has focused its attention on hate crimes of all types by increasing staffing in the Civil Rights Division, by bringing more cases against bigots who engage in criminal behavior, and by signing into law new hate crime legislation.¹²³ The Administration has also attempted to intervene before hate violence erupts through the new Lone Wolf Initiative, which was created in the wake of the von Brunn murder,¹²⁴ and the broader Operation Vigilant Eagle, which targets white supremacists and other extremist groups.¹²⁵

b. Disparate Outcomes

The statistics on the apparent rise in hate groups and hate crimes in recent months and years, while potentially not as grave as generally reported, offer insight into the existence of overt racism in the modern United States and are worthy of our attention. However, they have a tendency to overshadow other, subtler—but arguably more consequential—evidence of the continued disadvantaged position of African Americans. Across a range of contexts—including health, employment, housing, and education—the data show blacks lagging behind whites, often by staggering margins.

¹²⁰ Hickey, *supra* note 22.

¹²¹ See *supra* text accompanying notes 6–19. During the 2008 campaign, Obama received more threats than any other presidential candidate on record and a number of white supremacists were arrested for threatening or planning to assassinate him. HOLTHOUSE, *supra* note 112.

¹²² See *supra* text accompanying notes 20–26.

¹²³ See *supra* text accompanying notes 20–26; see also Jeff Zeleny, *Obama Signs Hate Crimes Bill*, The Caucus, N.Y. TIMES, Oct. 28, 2009, <http://thecaucus.blogs.nytimes.com/2009/10/28/obama-signs-hate-crimes-bill/>.

¹²⁴ See Gary Fields & Evan Perez, *FBI Seeks to Target Lone Extremists*, WALL ST. J., June 15, 2009, at A3.

¹²⁵ See Cam Simpson & Gary Fields, *Veterans a Focus of FBI Extremist Probe*, WALL ST. J., Apr. 17, 2009, at A3.

In 2006, the teenage birth rate of blacks was almost twice that of whites, as was the percentage of low-birth-weight babies.¹²⁶ The average life expectancy of a black child born that year is five years less than the average life expectancy of a white child.¹²⁷ Part of that story has to do with chronic health problems afflicting blacks at higher levels than whites. The death rate from Human Immunodeficiency Virus in 2006 was more than seven times greater for black men than for white men, and it was more than seventeen times greater for black women than for white women.¹²⁸ In addition, over half of African American women are considered obese based on Body Mass Index (BMI) compared to just over thirty percent of white women.¹²⁹ Yet, black households are more than twice as likely to have food insecurity as white households, with one in ten black households having “very low food security.”¹³⁰

The schooling, employment, and housing numbers are similarly stark. As of 2008, 30.5% of white men had attained a college degree or higher, whereas only 18.7% of black men had.¹³¹ Moreover, the average black man with a bachelor’s degree earned over \$20,000 less than his white counterpart.¹³² The disparity extends into the unemployment rolls, where recent data show that 10.1% of the black civilian labor force is unemployed as opposed to 5.2% of the white

¹²⁶ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, SECTION 2: BIRTHS, DEATHS, MARRIAGES, AND DIVORCES tbls. 84, 86 (2010), *available at* <http://www.census.gov/prod/2009pubs/10statab/vitstat.pdf>.

¹²⁷ *Id.* at tbl.102.

¹²⁸ *Id.* at tbl.123.

¹²⁹ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, SECTION 3: HEALTH AND NUTRITION tbl.206 (2010), *available at* <http://www.census.gov/prod/2009pubs/10statab/health.pdf> (finding that 34.4% of black men are considered obese as compared to 31.6% of white men).

¹³⁰ MARK NORD ET AL., U.S. DEP’T OF AGRIC., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2008 11 (2009). “In households with very low food security, the food intake of some household members was reduced, and their normal eating patterns were disrupted because of the household’s food insecurity.” *Id.* at iii.

¹³¹ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, SECTION 4: EDUCATION tbl.225 (2010), *available at* <http://www.census.gov/prod/2009pubs/10statab/educ.pdf>.

¹³² *Id.* at tbl.227.

labor force.¹³³ With respect to housing, in 2008, 74.9% of whites owned their own homes compared with 47.5% of blacks.¹³⁴

The criminal justice system provides some of the most compelling evidence of unequal experiences: blacks receive harsher treatment from the moment they encounter a police officer all the way through sentencing. In one representative study, more than seventy-five percent of the drivers on Interstate 95 who were stopped and searched by the Maryland State Police were black, despite blacks' making up a drastically smaller proportion of travelers on the highway.¹³⁵ A more recent study in Ohio showed that African Americans are twice as likely to receive traffic citations as non-African Americans.¹³⁶ And research shows that officers "use greater force, including lethal force, with minority suspects than with White suspects."¹³⁷ Although less than fourteen percent of the U.S. population is African American, forty percent of defendants in felony cases are black, and the chance that a black will serve time in prison is 18.6%, compared to only a 3.4% chance for a white person.¹³⁸ In addition, blacks receive higher bails¹³⁹ and longer sentences than whites,¹⁴⁰ and they make up forty-one percent of the death row population.¹⁴¹

¹³³ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, SECTION 12: LABOR FORCE, EMPLOYMENT, AND EARNINGS tbl.576 (2010), available at <http://www.census.gov/prod/2009pubs/10statab/labor.pdf>.

¹³⁴ RAKESH KOCHLAR, PEW RESEARCH CTR., THROUGH BOOM AND BUST: MINORITIES, IMMIGRANTS AND HOMEOWNERSHIP (2009).

¹³⁵ Michael Schneider, *State Police I-95 Drug Unit Found to Search Black Motorists 4 Times More Often than White*, BALT. SUN, May 23, 1996, at B2; see also I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 850 (discussing similar data); David A. Harris, "Driving While Black" and All Other Traffic Offenses: *The Supreme Court and Pretextual Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 564–65 (1997).

¹³⁶ David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 267–68 (1999).

¹³⁷ Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006 (2007).

¹³⁸ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDERS STATISTICS, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm#findings>.

¹³⁹ See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994).

¹⁴⁰ See David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001).

¹⁴¹ See David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1652 (1998).

B. The Common Narrative

Underlying many of the arguments, policies, regulations, laws, and practices related to firearms and race are basic assumptions about human behavior. Whether we are conscious of it or not, all of us engage and interpret the world based on a naive psychological account of why people act the way that they do.¹⁴² The commonsense narrative, for example, helps us to explain why, as just discussed, blacks are pulled over more than whites while driving and why more African American women suffer from obesity than white women. It can also help us to decide who or what is to blame when it comes to the thousands of gun-related deaths that occur in the United States each year. And it can drive government initiatives and court opinions on issues like addressing poverty and interpreting the Constitution.

As detailed in other work, particularly in Western cultures,¹⁴³ the naive psychological account that most of us rely on most of the time is based on the idea that humans are rational, autonomous, self-transparent actors.¹⁴⁴ People are driven to act by readily identifiable dispositional factors (e.g., stable personality traits, beliefs, and attitudes), not by unseen or unappreciated elements in their situations (e.g., unconscious cognitive proclivities and structures and external environmental forces).¹⁴⁵ In this model, human behavior and

¹⁴² Social psychologists commonly refer to “folk psychology” in describing the implicit theory of human thinking and behavior “that growing up in society has provided us.” ALEXANDER ROSENBERG, *PHILOSOPHY OF SOCIAL SCIENCE* 19 (2d ed. 1995); see also Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, 10 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 173 (1977).

¹⁴³ There is considerable research that suggests that non-Westerners may have different attributional tendencies than those living in individualistic Western cultures. See, e.g., RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* (2003); Michelle Gabler et al., *Latin American, Asian, and American Cultural Differences in Perceptions of Spousal Abuse*, 83 *PSYCHOL. REP.* 587, 587–91 (1998); Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 *PSYCHOL. REV.* 224 (1991); Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 *J. PERSONALITY & SOC. PSYCHOL.* 949, 964 (1994).

¹⁴⁴ See, e.g., Hanson & Yosifon, *The Situation*, *supra* note 27; Hanson & Yosifon, *The Situational Character*, *supra* note 27; Benforado & Hanson, *supra* note 27.

¹⁴⁵ The tendency to attribute the actions and outcomes of others to dispositional factors and to underestimate the influence of situational factors has been shown in thousands of experiments over many years and is commonly referred to as the “fundamental attribution error.” See, e.g., ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 428–32 (1999); LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION*:

resulting outcomes are controllable and reflect individual preferences; thus, absent some clear, explicit source of coercion, it follows that people should be held accountable for their choices, good or bad.¹⁴⁶

1. *The Conscious Racist*

The rational actor narrative powerfully informs the issue of racism and discrimination. Under this conceptual model—which is consonant with what Sumi Cho has described as the emerging mainstream consensus of “post-racialism”¹⁴⁷—racial bias is a conscious choice.¹⁴⁸ You choose to be a bigot, or you choose not to be. It is about self-control. And racial bias is easy to spot. Those who demonstrate it wear white hoods and march in parades with swastika armbands. They fly Confederate flags and tell racist jokes on the job. They visit white supremacist Web sites, attend rallies, and burn crosses. Racial discrimination happens when someone who hates blacks or Latinos or Asians explicitly refuses to hire a minority candidate because of his race or bars minorities from using a golf course. Overt bad acts reveal bad dispositions and show us the extent of the threat. Richard Ford’s description of “the racist” is representative of this common narrative: “The racist is a fossil of an ancien régime of blood privilege and also a pathetic and potentially dangerous psychopath; a fetishist of skin, hair, and lips; a moral pervert.”¹⁴⁹

PERSPECTIVES OF SOCIAL PSYCHOLOGY 125–33 (1991); Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21 (1995). As Lee Ross and Donna Shestowsky explain, “Due to this bias, laypeople are prone to overestimate the degree of stability likely to be manifest in a given individual’s behavior over time and across different contexts, and to underestimate the extent to which changes in the particular circumstances or environment confronting that individual might produce significant changes in his or her behavior.” Lee Ross & Donna Shestowsky, *Contemporary Psychology’s Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1092–93 (2003) (footnote omitted).

¹⁴⁶ See Alan Page Fiske et al., *The Cultural Matrix of Social Psychology*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 915, 920 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (“The person is believed to consist of a set of ‘internal,’ ‘personal’ attributes Taken together, these attributes define each person as an autonomous, freely choosing, special individual.”).

¹⁴⁷ See Cho, *supra* note 102, at 1592–94.

¹⁴⁸ See Adam Benforado & Jon Hanson, *The Scholarly Retort: Keeping Social Psychology out of Academia*, in IDEOLOGY, PSYCHOLOGY, AND LAW (forthcoming 2011).

¹⁴⁹ RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 30 (2008).

And so it follows that, to deal with the problem of racism, all we need to do is clamp down hard on the few hate mongers in our midst who demonstrate overt bigotry. When we lock up all of the neo-Nazis, bigoted cops who brutalize black suspects, and employers who use the “n” word, we will have largely addressed the problem of racism because the problem is to be found entirely inside a few bad apples, not in situational factors—like the historical legacy of slavery or powerful racial stereotypes in mainstream society. Consequently, any lingering disparate racial outcomes can be assumed to have nothing to do with racial prejudice. Rather, they must reflect freely made choices and dispositional flaws in those who are “underperforming.” Ongoing racial segregation is a result of black people choosing to live with those with whom they feel most comfortable. The high poverty rate of black families and high delinquency rate of young black males can be traced to the bad decisions of black fathers who fail to exercise personal responsibility and abandon their children.

This narrative is the defining one when it comes to race—and it has found its way into our laws and is reflected in our social and political discourse.

The legal conception of discrimination is grounded in the notion of rational, conscious choice.¹⁵⁰ In the employment context, under Title VII, to prevail under a “disparate treatment” theory, it is necessary for a black employee “to prove not only that he received less favorable treatment than his [white] coworkers, but that his superiors purposefully, deliberately, and intentionally treated him differently because of his [race].”¹⁵¹ As Linda Hamilton Krieger has summarized,

[I]ntergroup discrimination . . . is assumed to result from discriminatory motive or intent. . . . In the stories told by disparate treatment case law, there is no discrimination without an invidiously motivated actor. . . .

¹⁵⁰ See Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 CAL. L. REV. 747, 753 (2001) (“[A]ntidiscrimination law is inadequate because it targets mainly intentional discrimination, missing the more prevalent contemporary forms of bias that are often nondeliberate or unconscious.”).

¹⁵¹ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1163 (1995); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (offering the first articulation of the theory).

[In addition], disparate treatment analysis assumes that, unless they harbor discriminatory intent or motive, decisionmakers will act objectively and judge rationally. . . .

....

Finally, disparate treatment jurisprudence—indeed the entire normative structure of anti-discrimination law—is based on an assumption that decisionmakers possess “transparency of mind,” that they can accurately identify why they are about to make, or have already made, a particular decision.¹⁵²

Similar notions underlie the U.S. approach to jury selection. Members of a jury pool cannot be excluded pursuant to a peremptory challenge solely because they belong to a “cognizable racial group.”¹⁵³ The underlying assumption is that there are some attorneys out there who consciously choose to discriminate and that those “bad apples” can be identified by requiring them to articulate a race-neutral justification for their peremptory challenge after the opposing attorney has established a *prima facie* case of racial discrimination.¹⁵⁴

Given other changes in the law, one might assume that more recent case law is less reliant on the self-transparent, autonomous, rational actor model, but the model remains dominant. Indeed, whether it reflects new “post-racialism” or the existing framework of “colorblindness,” race jurisprudence from the Roberts Court shows the continuing potency of the narrative.¹⁵⁵ In the 2007 case *Parents Involved in Community Schools v. Seattle School District No. 1*, the Chief Justice’s opinion manifested an understanding that race-based government approaches—whether related to affirmative action, minority voting, or school desegregation—are all rigorously scrutinized because, outside of a few overt bigots, modern Americans clearly do not carry racial biases that might cause disparate outcomes.¹⁵⁶ Racial inequalities certainly do exist, and they are regrettable, but they can be addressed either by universal reforms or in dispositional approaches within the black community in the form of

¹⁵² Krieger, *supra* note 151, at 1166–67.

¹⁵³ Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 262 (2007) (quoting *Batson v. Kentucky*, 476 U.S. 79, 80 (1986)); see also Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

¹⁵⁴ Sommers & Norton, *supra* note 153, at 262–63.

¹⁵⁵ See Cho, *supra* note 102, at 1620.

¹⁵⁶ 551 U.S. 701, 748 (2007).

self-help and individual discipline.¹⁵⁷ To suggest otherwise—that some sort of racial bias is behind disparate impacts and that race-based policies are necessary—is to “play the race card” and to reveal one’s own bad disposition, indeed, one’s “racism.”¹⁵⁸ As Chief Justice Roberts explained in *Parents Involved*, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁵⁹

Despite being across the political aisle, Barack Obama’s “post-racialist” vision is similarly indebted to the autonomous, rational-actor model. Whether it is genuine or simply a way to appeal to the mass populace, much of the President’s rhetoric has focused on personal responsibility, diligence, and self-discipline by members of the black community. In a speech on Father’s Day, for example, he connected problems in the black community to poor parenting and lack of discipline.¹⁶⁰ In line with the narrative outlined above, he called upon fathers to exercise “responsibility” and suggested that violence among young black males could be eliminated by instilling the values of self-respect and hard work.¹⁶¹ The narrative also helps to explain the Obama Administration’s vigorous attack on hate crimes—hate crimes are both the center and outer edge of racism in our country. Hate crimes situate race-based violence in the bad disposition-driven choices of readily identifiable and discrete individuals and groups. It follows that, if such crimes can be eliminated, we will have achieved the promise of post-racialism.

2. *The Rational Shooter*

The same underlying model informs core conceptions of the Bill of Rights—including the Second Amendment. Because people are

¹⁵⁷ In a post-racial world, there can be no race-based policies, only race-neutral universal ones. See John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 791 (2009).

¹⁵⁸ See Cho, *supra* note 102, at 1603 (“[P]ost-racialism draws a *moral equivalence* between ‘racialism’ under Jim Crow which subordinated racial minorities, and the ‘racialism’ of the civil-rights era, which sought to remedy minority subordination.”); see also FORD, *supra* note 149, at 27–30, 338 (drawing a strong distinction between those “like Rosa Parks [who] risked all to stand up to unabashed bigots who were backed by social convention and the force of law” and those modern “opportunists” and “gate-crashers” who complain of “minor and ambiguous slights”).

¹⁵⁹ *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

¹⁶⁰ *Obama’s Father’s Day Remarks*, Transcript, N.Y. TIMES, June 15, 2008, <http://www.nytimes.com/2008/06/15/us/politics/15text-obama.html>.

¹⁶¹ *Id.*

rational, autonomous individuals, the best system is one that provides them with the maximum possible freedom. People control their environment through “free will”; the environment does not control people. In the context of the First Amendment, as Ronald Dworkin has written, the “[g]overnment insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions.”¹⁶² Thus, the assumption underlying the incitement standard in *Brandenburg v. Ohio*¹⁶³ is “that, except in extreme circumstances, human beings can resist harmful messages through reflection and rational thought.”¹⁶⁴ Acts of hatred reveal evil dispositions, not the influence of external situational forces. Good people make good choices to resist bad messages.

The same reasoning underlies the discourse surrounding the Second Amendment, whether at the level of simple slogans or Supreme Court opinions. Gun deaths can be traced to the bad dispositions and choices of certain people, not to the guns themselves (or to subconscious or unconscious processes). This truth is as obvious and clear as a bumper sticker: “Guns don’t kill people; [bad] people kill people.”¹⁶⁵ “Blaming guns for the deaths in the country is like blaming the gas chambers for the holocaust.”¹⁶⁶ “If Guns Kill People . . . Do Pens Misspell Words?”¹⁶⁷ From this viewpoint, it is patronizing to think that the public needs to be controlled by the government; the vast majority of people can take care of themselves because they are rational actors. The state does not need to treat its citizens like children. In fact, guns help protect us all from the evil around us. It is our right to bear arms that keeps us safe from the few bad apples out there who might otherwise do us harm: “WHEN GUNS ARE OUTLAWED, ONLY OUTLAWS WILL HAVE GUNS.”¹⁶⁸ And, just as important, our personal Second Amendment

¹⁶² RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 200 (1996).

¹⁶³ 395 U.S. 444 (1969).

¹⁶⁴ Matthew D. Bunker & David K. Perry, *Standing at the Crossroads: Social Science, Human Agency and Free Speech Law*, 9 COMM. L. & POL’Y 1, 4 (2004).

¹⁶⁵ *Gun Rights*, STICKER GIANT.COM, http://www.stickergiant.com/guns_bgun_pg1 (last visited Oct. 12, 2010).

¹⁶⁶ *Gun Control—Bumper Stickers*, RUSH ONLINE, <http://www.rushonline.com/bumperstickers/guncontrol.htm> (last visited Oct. 12, 2010).

¹⁶⁷ *Gun Bumper Stickers*, ZAZZLE, <http://www.zazzle.com/gun+bumperstickers> (last visited Oct. 12, 2010).

¹⁶⁸ *Gun Control—Bumper Stickers*, *supra* note 166.

rights protect us from a tyrannical government that might take away our freedoms (particularly our freedom to choose). As other pro-gun bumper stickers explain: “An Armed Man Is A Citizen. AN UNARMED MAN IS A SUBJECT.”¹⁶⁹ “DO YOU TRUST A GOVERNMENT THAT CANNOT TRUST YOU WITH GUNS?”¹⁷⁰ “Stalin, Mao and Hitler All Favored Gun Control.”¹⁷¹ “First gun control, then mind control.”¹⁷² “It’s not gun control, it’s FREEDOM control.”¹⁷³ Thus, guns come to embody ideals of individual autonomy and self-reliance.¹⁷⁴ As Charlton Heston told an audience at the 2000 NRA Annual Meeting, “When ordinary hands can possess such an extraordinary instrument, that symbolizes the full measure of human dignity and liberty.”¹⁷⁵

Although the arguments are more sophisticated than the preceding slogans, the Supreme Court’s recent approach to the Second Amendment and much existing gun regulation reflects exactly the same underlying assumptions about rational, autonomous, self-transparent actors. Nowhere is this clearer than in the categories of people who are excluded from enjoying rights under the Amendment. 18 U.S.C. § 922(g), enacted prior to *Heller*, prohibits those convicted of crimes punishable by imprisonment of more than a year, drug addicts, and “mental defectives,” among others, from possessing firearms.¹⁷⁶ And the Court in *Heller* was explicit that nothing in the opinion “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”¹⁷⁷ Although Justice Breyer suggested that these exceptions were

¹⁶⁹ *Gun Rights Bumper Stickers, Stickers, and Decals*, CAFE PRESS, <http://www.cafepress.com/+gun-rights+bumper-stickers?page=2&topic=106636> (last visited Oct. 12, 2010).

¹⁷⁰ *Gun Rights*, *supra* note 165.

¹⁷¹ *Guns Bumper Stickers and Small Stickers*, BUMPER ART, <http://www.bumperart.com/Guns.htm> (last visited Oct. 12, 2010).

¹⁷² *Gun Control—Bumper Stickers*, *supra* note 166.

¹⁷³ *Id.*

¹⁷⁴ See Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1206 (2009).

¹⁷⁵ Charlton Heston, Opening Remarks to Members at the NRA Annual Meeting in Charlotte, North Carolina (May 20, 2000), <http://www.youtube.com/watch?v=TQtrdFYDzCU>. In his speech, Heston also warned of “the divisive forces that would take freedom away.” *Id.*

¹⁷⁶ 18 U.S.C. § 922(g) (2006).

¹⁷⁷ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17. The Court reiterated this position in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010).

“judicial ipse dixit,”¹⁷⁸ as Carlton F.W. Larson has pointed out, “it is hard to imagine the Court invaliding them in a future case,”¹⁷⁹ and some lower courts have already weighed in that “*Heller* . . . was not intended to open the door to a raft of Second Amendment challenges to § 922(g) convictions.”¹⁸⁰ What drug addicts, convicted criminals, and the mentally ill have in common is that they have all proven themselves to be less than rational.¹⁸¹ Moreover, courts have not “been inclined to distinguish between violent and nonviolent felons,”¹⁸² which implies that the prohibition on gun ownership turns on demonstrated “irrationality” rather than demonstrated “dangerousness.”¹⁸³ This reading is bolstered by the fact that the only other notable group not mentioned in § 922(g), but also denied a right to gun ownership, is also commonly assumed to lack true and complete rationality: children.¹⁸⁴ As discussed earlier, gun restrictions in schools continue to be fairly strict, and one possible

¹⁷⁸ *Heller*, 128 S. Ct. at 2870 (Breyer, J., dissenting).

¹⁷⁹ Carlton F.W. Larson, *Four Exceptions in Search of a Theory*: District of Columbia v. *Heller* and *Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009).

¹⁸⁰ *United States v. Baron*, Nos. CR-06-2095, CV-08-3048, 2008 WL 5102307, at *2 (E.D. Wash. Nov. 25, 2008); *see also, e.g.*, *Triplett v. Roy*, No. 08-40904, 2009 WL 1154892, at *1 (5th Cir. Apr. 30, 2009) (per curiam); *United States v. Brye*, No. 08-12578, 2009 WL 637553, at *1 (11th Cir. Mar. 13, 2009); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009); *United States v. McRobie*, No. 08-4632, 2009 WL 82715, at *1 (4th Cir. Jan. 14, 2009) (per curiam); *United States v. Brunson*, 292 F. App’x 259, 261 (4th Cir. 2008) (per curiam); *United States v. Irish*, 285 F. App’x 326, 327 (8th Cir. 2008) (per curiam); *United States v. Frazier*, No. 07-6135, 2008 WL 4949153, at *5 (6th Cir. Nov. 19, 2008).

¹⁸¹ It is worth noting that while federal law does not include a parallel restriction, “[e]ighteen states and the District of Columbia [also] restrict access to firearms by alcohol abusers.” LEGAL CMTY. AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS viii (2008).

¹⁸² Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1249 (2009).

¹⁸³ As further support for this proposition, both quadriplegics and blind people have been deemed to have a right to own firearms. *See, e.g.*, Martha Neil, *Quadriplegic Has Right to Own Firearms, Judge Rules*, ABA J., Nov. 11, 2009; Dave Kolpack, *Blind Man Says His Gun Permit Does Not Make Him Dangerous*, BISMARCK TRIB., May 15, 2007. Although they may lack the ability to hold a gun, pull the trigger, or see the target—all factors that might make their use of weapons more of a safety threat—individuals with these conditions demonstrate rationality.

¹⁸⁴ *See* LEGAL CMTY. AGAINST VIOLENCE, *supra* note 181, at 81–86 (summarizing federal, state, and local minimum age requirements for purchase and possession of firearms); 18 U.S.C. § 922(b)(1), (c)(1), (x)(1–5) (federal law prohibits sale of most guns, with certain exceptions, to those under eighteen and possession of handguns by those under eighteen).

explanation is that we view children as more vulnerable and less rational actors.

Even some of those who disagreed with the *Heller* majority and filed briefs urging the Court in *McDonald* not to apply the Second Amendment to the states seem to accept largely the same model. What they contest is not the idea that there are rational shooters and irrational shooters (who ought to be denied gun ownership rights) but the assumption that guns can be kept in the hands of the rational shooters. As evidence, in the *McDonald* amicus briefs, for example, these advocates cite studies showing that many guns are stolen and ultimately end up in the possession of criminals;¹⁸⁵ that mentally unstable people use guns to commit suicide;¹⁸⁶ and that in the wake of loosened gun regulations, racist extremists will stockpile weapons that they will use in hate crimes.¹⁸⁷

The threat of guns is, thus, explicit—it lies in the dispositions and conscious choices of those who use them. Putting together the narrative on racism and the narrative on gun rights, the conclusion is that the only danger of violence to minorities comes from the “irrational” people in our midst: bigoted lunatics like von Brunn. Root them out and lock them up or, alternatively, prevent them from getting weapons, and the threat to African Americans vanishes like smoke.

II

CHALLENGES TO THE DOMINANT AGENCY MODEL

A. *Implicit Bias*

The dominant agency model is wrong. The idea that we largely direct our thoughts and behavior through a conscious exertion of our will is strongly undermined by hundreds of peer-reviewed articles that establish that “people can possess attitudes, stereotypes, and prejudices in the absence of intention, awareness, deliberation, or effort.”¹⁸⁸ Even as we continue to view ourselves as rational, self-

¹⁸⁵ See Brief of the Association of Prosecuting Attorneys and District Attorneys as Amici Curiae at 18, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

¹⁸⁶ See Brief of Amici Curiae Brady Center, *supra* note 41, at 11.

¹⁸⁷ See Brief of Amici Curiae Anti-Defamation League, *supra* note 3, at 5.

¹⁸⁸ See John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 42–43 (2009).

transparent choosers, our actions—in every area of our lives—are being powerfully influenced by automatic processes that require no conscious initiation and that operate beyond our perception.¹⁸⁹

Part of our reflexive system that allows us to navigate information-rich environments involves implicit intergroup attitudes.¹⁹⁰ We carry automatic associations—reflecting beliefs about typical group attributes (that is, stereotypes) and affective responses to particular groups (that is, prejudice)—that help us quickly to make sense of the people we meet.¹⁹¹ Key associations—both positive and negative—relate to “race, ethnicity, nationality, gender, social status, and other distinctions.”¹⁹²

Although researchers have employed a number of methods to measure implicit bias, the most widely used procedure is the Implicit Association Test (IAT).¹⁹³ The IAT works by measuring response latencies as individuals attempt to categorize concepts on a computer—concepts that are strongly associated are quickly sorted, and those that are not strongly associated take subjects more time.¹⁹⁴ In a typical IAT, a participant in a study is provided with exemplars of two social categories (for example, whites or blacks, homosexuals or heterosexuals, old people or young people), which they must then associate with certain abstract evaluative concepts (often words that

¹⁸⁹ Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 137 (2010).

¹⁹⁰ See Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 164 (2008).

¹⁹¹ See also Charles M. Judd et al., *Automatic Stereotypes vs. Automatic Prejudice: Sorting Out the Possibilities in the Payne (2001) Weapon Paradigm*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 75, 76 (2004).

¹⁹² Jost et al., *supra* note 188, at 39.

¹⁹³ Other methods employed in research on implicit attitudes include “Stroop and lexical decisions tasks, supraliminal and subliminal priming procedures, and linguistic bias coding techniques.” Jost et al., *supra* note 188, at 46; see also, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 950–53 (2006) (reaction time); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 487–88 (2004) (priming); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729–30 (2000) (brain scan).

¹⁹⁴ See Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III, Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18 (2009).

have positive or negative valences, like “joy,” “love,” “happiness,” “agony,” “pain,” and “evil”).¹⁹⁵

With respect to race,

people who are faster to categorize the faces or names of whites when they are paired with positive (vs. negative) stimuli and, conversely, the faces or names of blacks when they are paired with negative (vs. positive) stimuli, are theorized to have internalized a stronger preference for whites relative to blacks, compared to people who respond more equivalently across different category-valence pairings (or in the opposite direction).¹⁹⁶

Since 1998, more than 4.5 million IATs have been taken,¹⁹⁷ and the results show pervasive implicit racial bias: indeed, about seventy percent of those who have taken the race-bias version of the test were found to exhibit “an unconscious, or implicit, preference for white people compared to blacks.”¹⁹⁸ The tendency has been demonstrated in both whites and blacks, although whites show a far stronger “white preference” on the IAT, and blacks demonstrate much greater variation in their preferences (on average, blacks demonstrate a slight white preference, but some blacks show a strong black preference and some a strong white preference).¹⁹⁹ In addition, implicit racial bias—as a process operating in the unconscious—“can exist even in those who espouse egalitarian values.”²⁰⁰ People who strongly favor equal treatment for all races and do not believe themselves to favor one race over another can nonetheless produce IAT scores that reveal implicit racial bias. And implicit bias is present in people in a variety of

¹⁹⁵ *Id.*; R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1182 (2006).

¹⁹⁶ Jost et al., *supra* note 188, at 45; *see also* Greenwald et al., *supra* note 194.

¹⁹⁷ *See General Information*, PROJECT IMPLICIT, <http://www.projectimplicit.net/generalinfo.php> (last visited Oct. 12, 2010). On the Web site, readers can take a variety of different IATs.

¹⁹⁸ *Predictive Validity Meta-Analysis of the Implicit Association Test Is Published*, PROJECT IMPLICIT (June 19, 2009), <http://projectimplicit.wordpress.com/2009/06/19/predictive-validity-meta-analysis-of-the-implicit-association-test-is-published/>.

¹⁹⁹ *See* Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 104–05 (2002). Implicit bias also appears to impact attitudes toward other racial groups including Asians and Hispanics. *See, e.g.*, L. Son Hing et al., *Inducing Hypocrisy to Reduce Prejudicial Responses Among Aversive Racists*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 71 (2002); Eric Uhlman et al., *Subgroup Prejudice Based on Skin Color Among Hispanics in the United States and Latin America*, 20 SOC. COGNITION 198, 198 (2002).

²⁰⁰ Joy-Gaba & Nosek, *supra* note 189; *see also* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUROPEAN REV. SOC. PSYCHOL. 1, 36 (2007).

different settings: doctors and nurses, police officers, students, and employment recruiters, among many others, all have demonstrated white preference on the IAT.²⁰¹ Indeed, recent research shows that even judges harbor implicit racial biases.²⁰²

If people exhibit unconscious prejudice and stereotyping about blacks, what, specifically, are the stereotypes in operation? Although “black,” as a racial category, appears to “function[] as the prototypical associate for a number of ostensibly race-neutral concepts, such as . . . jazz, basketball, and ghetto,”²⁰³ the most common stereotype applied to blacks appears to involve linking them to crime and violence.²⁰⁴ Moreover, this latter association appears to be bidirectional: “Black faces and Black bodies can trigger thoughts of crime, [just as] thinking of crime can trigger thoughts of Black people.”²⁰⁵

B. Bias in Action

1. General Background

Whether they reflect cultural factors or more “‘personal,’ idiosyncratic preferences,”²⁰⁶ the critical point is that implicit prejudice and stereotypes are more than just “thoughts” in peoples’ heads; they have real world impacts. Automatic associations influence behavior by both professionals and laypeople in employment, medical, voting, law enforcement, and countless other contexts.²⁰⁷

²⁰¹ Jost et al., *supra* note 188, at 39.

²⁰² Rachlinski et al., *supra* note 102, at 1221. The researchers “found that the black judges produced IAT scores comparable to those observed in the sample of black subjects obtained on the Internet. The white judges, on the other hand, demonstrated a statistically significantly stronger white preference than that observed among a sample of white subjects obtained on the Internet.” *Id.* at 1210–11.

²⁰³ Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 877 (2004).

²⁰⁴ Banks et al., *supra* note 195, at 1172 (citing Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995); PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 43–45 (1993)); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006) (“People associate Black physical traits with criminality in particular.”).

²⁰⁵ Eberhardt et al., *supra* note 203, at 876.

²⁰⁶ Jost et al., *supra* note 188, at 60.

²⁰⁷ *Id.* at 1, 5–6.

When presented with black faces as opposed to white faces, those showing stronger racial bias on the IAT demonstrate greater activation in the amygdala—part of the brain associated with emotion²⁰⁸—and that neural activity appears to lead to contrasting behavior based on race. In a representative study, researchers found that those physicians who demonstrated IAT scores that showed a white preference chose less effective treatments for hypothetical black patients suffering coronary artery disease than they did for white patients with identical symptoms.²⁰⁹ This was despite the fact that the doctors did not report any explicit preference for whites over blacks or any belief that blacks were more or less cooperative than whites.²¹⁰ In another set of studies, researchers found that employers who had received résumés to review were far more likely to call back candidates with white names than equally qualified candidates with black names and that race-sensitive résumé selection appears to be linked to implicit stereotyping scores.²¹¹ Likewise, IAT performance has been tied to social behavior toward blacks, including body openness and positioning, eye contact, and seating distance.²¹²

Members of the criminal justice system are not immune to the power of implicit racial bias. Jennifer Eberhardt and her colleagues found that priming police officers with the concept of “crime” led officers to attend to black faces and to misremember black faces that

²⁰⁸ See William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCHOL. SCI. 806, 806 (2004).

²⁰⁹ See Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1235 (2007).

²¹⁰ See *id.*

²¹¹ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); Marianne Bertrand et al., *Implicit Discrimination*, 95 AM. ECON. REV. 94 (2005).

²¹² See Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 440 (2001); see also John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 62 (2002) (“[T]he response latency measure significantly predicted Whites’ nonverbal friendliness [toward Black partners] and the extent to which the confederates and observers perceived bias in the participants’ friendliness . . .”). Priming with the black racial category may also result in altered behavior—including increased hostility—more generally. See, e.g., John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230, 239 (1996) (“[P]articipants for whom the African American stereotype was primed subliminally reacted with more hostility to a vexatious request of the experimenter” and the reaction was not predicted by explicit racism measures.).

they had seen as more stereotypical (that is, more representative) of the black racial category than they actually were.²¹³ Investigators have also documented that judicial behavior may be affected by implicit biases in certain circumstances.²¹⁴

Overall, a 2009 meta-analysis of IAT research reports found that the predicative validity of the IAT for racially differential behavior, judgments, and physiological manifestations was strong and “significantly exceeded the predictive validity of self-report measures.”²¹⁵

2. *Shooter Bias*

Although consequential, much of the behavior discussed in the previous subsection relating to implicit racial bias does not have direct life-and-death implications. Yet, research over the last decade has documented just such a connection between automatic processes and lethal outcomes. This work provides the strongest evidence that the commonsense narrative of rational shooters and conscious racists, investigated earlier, is largely inaccurate and that blacks face a threat from firearms that is both far more significant and different in character than that posed to whites.

Experimental evidence suggests that both private citizens and police officers use race in their decision making related to shooting.²¹⁶ When participants are exposed to black faces they are quicker to identify photographed objects as guns than when they are

²¹³ Eberhardt et al., *supra* note 203, at 891 (“Thus, the association between blackness and criminality was not only triggered, it was magnified.”).

²¹⁴ Rachlinski et al., *supra* note 102, at 1221.

²¹⁵ Greenwald et al., *supra* note 194, at 17, 32; *see also* Jost et al., *supra* note 188, at 46 (“[T]he evidence for the predictive validity (or behavioral significance) of implicit bias . . . is already strong, and it continues to grow in depth and breadth.”).

²¹⁶ *See, e.g.*, Correll et al., *supra* note 137 (police officers); Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 126 (2006) [hereinafter Correll et al., *Event-Related Potentials*] (members of the public); E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Suspects*, 16 PSYCHOL. SCI. 180, 180 (2005) (police officers); Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399, 399 (2003) (members of the public); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002) [hereinafter Correll et al., *The Police Officer's Dilemma*] (members of the public); *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (introducing some of the early studies to the law review literature, but appearing before any of the work on police officers and the impact of training—the basis of this Article—had been published).

exposed to white faces;²¹⁷ they are also more likely to misidentify objects as guns when required to respond quickly.²¹⁸

Beyond the issue of weapons identification, individuals appear to demonstrate a bias in actually pulling the trigger. Since 2002, researchers have conducted more than twenty studies designed to assess the influence of race on “shoot/don’t-shoot” decision making.²¹⁹ These studies have generally used a video-game-like simulation in which participants are presented with images of people holding different objects (e.g., wallets, cell phones, and guns) in various environments.²²⁰ Participants are told to respond by shooting all armed individuals and not shooting all unarmed individuals. In the experiments, researchers have found that people show racial bias both with respect to how fast they make decisions to shoot or not to shoot and to how accurate those decisions ultimately are.²²¹ As Joshua Correll and his coauthors summarize, “Participants are faster and more accurate when shooting an armed Black man rather than an armed White man, and faster and more accurate when responding ‘don’t shoot’ to an unarmed White man rather than an unarmed Black man.”²²² Scores on explicit prejudice scales do not correlate with shooter bias.²²³ However, experimental participants who demonstrate

²¹⁷ See B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 187 (2001).

²¹⁸ *Id.* at 189; see also Judd et al., *supra* note 191, at 80 (finding that black face primes facilitate the identification of both handguns and sports-related objects and result in less misidentifications than white face primes). In addition, Jennifer Eberhardt and her colleagues have found that “in cases involving a White victim, the more stereotypically Black a defendant is perceived to be, the more likely that person is to be sentenced to death.” Eberhardt et al., *supra* note 204, at 383–84.

²¹⁹ See Correll et al., *supra* note 137, at 1007.

²²⁰ See, e.g., Correll et al., *The Police Officer’s Dilemma*, *supra* note 216, at 1314. A sample simulation is available at *Shooter Effect*, UNIV. OF CHI., <http://backhand.uchicago.edu/Center/ShooterEffect/> (last visited Oct. 10, 2010).

²²¹ See, e.g., Correll et al., *The Police Officer’s Dilemma*, *supra* note 216, at 1325.

²²² Correll et al., *supra* note 137, at 1007; see also Correll et al., *Event-Related Potentials*, *supra* note 216, at 127 (“[B]oth threat perception and conflict detection play an important role, and crucially, . . . racial cues promote biased shooting behavior because (a) Black targets seem more threatening than White targets, and (b) White targets conflict more strongly with the tendency to shoot than do Black targets.”); Greenwald et al., *supra* note 216 (“[T]wo race effects . . . led to Blacks being incorrectly shot at more than Whites: a perceptual sensitivity effect (when held by Blacks guns were less distinguishable from harmless objects) and a response bias effect (objects held by Blacks were more likely to be treated as guns).”).

²²³ See, e.g., Correll et al., *The Police Officer’s Dilemma*, *supra* note 216, at 1322.

implicit associations between blacks and weapons are more biased in their shooting behavior.²²⁴ The notion that, at the unconscious level, racial stereotypes have a stronger impact on firing decisions than general negative sentiments toward African Americans is bolstered by the fact that white and black participants demonstrate equivalent levels of shooter bias.²²⁵

Although the main focus of this Article is on African Americans and shooter bias, it is worth noting that several recent studies suggest that blacks may not be the only minorities at risk of racially biased shooting behavior. For example, researchers have found significant bias with respect to shoot/don't shoot decision making concerning targets wearing stereotypical Islamic garb.²²⁶

C. Controlling for Bias

1. General Background

Despite the potency and pervasiveness of implicit bias, discriminatory judgments and behavior are not inevitable.²²⁷ In fact, recent studies suggest that interior and exterior situational factors—including “the nature of the decision, availability of cognitive resources, individuating information, and motivation”—can mediate

²²⁴ See Glaser & Knowles, *supra* note 190, at 167–71; see also Correll et al., *The Police Officer's Dilemma*, *supra* note 216, at 1320–21.

²²⁵ See, e.g., Correll et al., *The Police Officer's Dilemma*, *supra* note 216, at 1325; see also Judd et al., *supra* note 191, at 80.

²²⁶ Christian Unkelbach et al., *The Turban Effect: The Influence of Muslim Headgear and Induced Affect on Aggressive Responses in the Shooter Bias Paradigm*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1409, 1409 (2008) (targets depicted wearing Islamic head dress). Kevin K. Fleming, Carole L. Bandy, and Matthew O. Kimble documented a similar effect with a sample of young military cadets who had never been in a combat situation. Kevin K. Fleming et al., *Decisions to Shoot in a Weapon Identification Task: The Influence of Cultural Stereotypes and Perceived Threat on False Positive Errors*, 5 SOC. NEUROSCIENCE 201, 204, 212 (2010). The cadets were asked to press a “shoot” key whenever they were presented with an image of a gun and a “don't shoot” key whenever they were presented with an image of a tool. *Id.* at 208. They were faster and more accurate in deciding to shoot after being primed with images of blacks and Middle Eastern males in traditional clothing, and they were slower and less accurate when primed with images of whites and Middle Eastern males in western clothing. *Id.* at 212. Likewise, images of blacks and Middle Eastern men led to “more false positive errors and fewer correct rejections for the tools.” *Id.*

²²⁷ See, e.g., Joy-Gaba & Nosek, *supra* note 189 (“[T]he growing body of evidence challenging the assumption of automatic inflexibility . . . [and encouraging a] new understanding of automaticity as contextually sensitive and amenable to change”).

unconscious biases.²²⁸ Although work on the malleability of implicit social cognition is ongoing,²²⁹ researchers have advanced a number of approaches aimed at overcoming implicit bias including “cultivating egalitarian motives[;] exposing people to favorable, counterstereotypical exemplars[;] providing opportunities for emotional reconditioning[;] increasing vigilance about one’s subtle behavior during interactions with disadvantaged others[;] and educating people about their implicit biases.”²³⁰

With respect to several of the studies documenting implicit bias and its role in behavior, researchers have provided evidence for effective compensation strategies. Physicians in the study of coronary artery disease who had IAT scores that revealed implicit bias, for example, were more likely to offer the optimal treatment to black patients when they were aware that the study was designed to look at racially disparate outcomes than when they were not.²³¹ Similarly, Jeffrey Rachlinski and his coauthors found that, although judges carry implicit racial bias just like the rest of the population, “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”²³² Based on these findings, they suggested that to minimize the impact of unconscious bias on judicial decision making, the criminal justice system ought to consider “exposing judges to stereotype-incongruent models, providing testing and training, auditing judicial decisions, and altering courtroom

²²⁸ Page & Pitts, *supra* note 102, at 28 (offering a nice summary of the existing debiasing literature); *see also* Joy-Gaba & Nosek, *supra* note 189 (“[T]here are personal and social factors that may elicit shifts in the activation or expression of implicit racial biases.”).

²²⁹ The robustness of current research suggests that such malleability is beyond doubt, but there is some concern that current published studies may overestimate the extent to which implicit biases may be reduced or controlled for. Joy-Gaba & Nosek, *supra* note 189, at 143–45; *see also* Jost et al., *supra* note 188, at 63. “The fact that implicit prejudice is observed at all under typical laboratory conditions—when the average participant has plenty of access to cognitive resources, can often discern that the study is about racial (or other intergroup) attitudes, and is under significant impression management constraints—suggests that laboratory studies probably contribute to underestimates rather than overestimates of prejudice.” *Id.* Jost and his colleagues, for example, have been very critical of assertions that accountability pressures alone can reduce or eliminate bias. *See id.* at 61–63.

²³⁰ Jost et al., *supra* note 188, at 56 (citations omitted).

²³¹ Green et al., *supra* note 209, at 1235–37 (“This suggests that implicit bias can be recognized and modulated to counteract its effects on treatment decisions.”).

²³² Rachlinski et al., *supra* note 102, at 1221.

practices.”²³³ Some of these situational factors may allow individuals to intervene before their implicit racial bias impacts their behavior, while other factors may lead to disrupting implicit associations directly.

2. *Shooter Bias*

As with other research on implicit social cognition, a number of shooter bias studies reveal that the unconscious influence of race on judgments and actions varies as a result of contextual factors and individual motivations, backgrounds, and experiences. For instance, Correll and his colleagues have documented that being exposed to newspaper stories about black criminals prior to participating in a simulation increases shooter bias.²³⁴ Likewise, being exposed to stereotypic (as opposed to counterstereotypic) targets during the actual simulation also influences the magnitude of racial bias.²³⁵ With respect to individual factors, researchers have found that those who are strongly motivated to control for prejudice are less influenced by implicit racial stereotypes that result in shooting bias.²³⁶

More directly relevant to this Article, other studies have demonstrated the important influence of training on reducing the impact of implicit racial bias on shooting decisions.²³⁷ In one set of experiments, E. Ashby Plant and B. Michelle Peruche found that

²³³ *Id.* at 1226.

²³⁴ Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 EUR. J. SOC. PSYCHOL. 1102, 1107 (2007) (“[R]einforcing or undermining racial stereotypes that link Blacks to danger and crime can dramatically affect the magnitude of racial bias in the decision to shoot.”).

²³⁵ *Id.* at 1111 (“[M]anipulations designed to increase the accessibility of the Black-danger association exacerbate bias in the decision to shoot.”).

²³⁶ Glaser & Knowles, *supra* note 190, at 169–70.

²³⁷ As Saaïd Mendoza, Peter Gollwitzer, and David Amodio recently summarized, “Expressions of racial bias are believed to comprise both automatic and controlled components, and either component may be targeted by strategies that aim to reduce the behavioral expression of implicit stereotypes.” Saaïd A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 512 (2010) (internal citation omitted). Rather than focusing on trying to “directly alter latent forms of bias built up during the course of a lifetime,” the researchers demonstrated the promise of reflexive engagement of control in reducing implicit bias effects. *Id.* at 520. More specifically, they documented “that a distraction-inhibiting implementation intention, which instructed participants to ignore the targets’ race, . . . [and] a response-facilitating implementation intention, which focused participants on task-relevant shoot/don’t shoot actions in response to critical stimuli (i.e., guns vs. benign objects), [both] led to an increase in controlled processing” *Id.*

although members of the public and police officers were initially more likely to shoot unarmed black suspects than unarmed white suspects, with extensive practice on a shooter simulation program, both populations were able to eliminate this bias.²³⁸

More recent work by Correll and his coauthors has strongly bolstered the argument for training as a critical tool for avoiding racially biased firearm use; but, unlike Plant and Peruche, the researchers did not find that police officers demonstrated significant evidence of bias in their shooting decisions even at the outset of testing (they did find such bias for community members).²³⁹ This difference appears to stem from the fact that the stimuli used by Correll and his collaborators “more closely mirror[ed] police training (e.g., Firearms Training System or firing range encounters) and on-the-job experiences” than the more basic stimuli employed by Plant and Peruche.²⁴⁰ As a result, officers’ previous training and experiences likely generalized to the Correll team’s shooting task (and prepared officers to control for implicit biases from the very beginning of the experiment), whereas the Plant and Peruche task was more novel and did not implicate previous police training.²⁴¹

Without relevant simulation experience or work in the field, community participants in the Correll team’s study performed much worse than police officer participants: they were slower to make correct responses, were worse at detecting the presence of a weapon, and were far more “trigger-happy” (setting a much lower criterion for

²³⁸ Plant & Peruche, *The Consequences of Race*, *supra* note 216, at 182 (police officers); E. Ashby Plant et al., *Eliminating Automatic Racial Bias: Making Race Non-Diagnostic for Responses to Criminal Suspects*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 141, 141. As a result, they concluded that “exposure to the program, in which the race of the suspect was unrelated to the presence of a weapon, eliminated the racial bias.” Plant & Peruche, *supra* note 216, at 182; Plant et al., *supra* (“The current work demonstrated the efficacy of a new approach to bias elimination that, as opposed to only exposing people to information that runs counter to the stereotype, exposed people to social stimuli where group membership (i.e., race) was statistically unrelated to the evaluated characteristic (i.e., being a violent criminal).”).

²³⁹ See Correll et al., *supra* note 137, at 1021.

²⁴⁰ *Id.* at 1021 (“Plant and Peruche presented Black and White male faces on which objects (e.g., a gun or wallet) had been superimposed. Our stimuli involve full-body images of men holding guns and other objects. These images are embedded in scenes, such as parks or cityscapes.”).

²⁴¹ See *id.* Plant and Peruche readily acknowledge this limitation concerning their experimental design and the fact that “learning is often quite domain-specific.” See Plant & Peruche, *supra* note 216, at 183.

the decision to shoot).²⁴² Concerning race effects, members of the community sample showed

a clear tendency to set a lower (i.e., more lenient or ‘trigger-happy’) criterion for Black, rather than White, targets. But this bias was weaker, or even nonexistent, for the officers. The reduction in bias seemed to reflect the fact that, compared with the community members, officers set a higher, more stringent threshold for the decision to shoot Black targets.²⁴³

With white targets, officers and community members did not differ, and both set a relatively high criterion.²⁴⁴ Yet, although police officers showed negligible bias in their ultimate decisions to shoot, they were quite similar to members of the public in demonstrating robust racial bias with respect to the speed with which they made shooting decisions: “Accurate responses to targets congruent with culturally prevalent stereotypes (i.e., armed Black targets and unarmed White targets) required less time than did responses to stereotype-incongruent targets (i.e., unarmed Black targets and armed White targets).”²⁴⁵ Officers, just like the community sample, held implicit racial bias, but their training allowed them to override the automatic associations. And, revealingly, when novice college students were trained on the shooter simulation, they too demonstrated “a significant decrease in racial bias, as measured by the decision criterion, accompanied by an increase in sensitivity.”²⁴⁶ Practice meant that they started to perform more like officers.²⁴⁷

²⁴² See Correll et al., *supra* note 137, at 1020.

²⁴³ See *id.* at 1015.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1020 (despite showing racial bias in reaction time just like members of the public, officers were nonetheless faster overall in making correct responses). In addition, “officers from urban, high-crime, predominantly minority districts (environments likely to reinforce stereotypes about Black people) showed greater racial bias in their latencies.” *Id.*

²⁴⁶ *Id.*

²⁴⁷ When trained student participants returned for a second day of simulation (forty-eight hours later), they again demonstrated racial bias initially, which Correll and his coauthors suggest is a result of the fact that the training they received was nowhere near as extensive as the training given to officers. *Id.* at 1020–21 (arguing that more extensive training is required for more permanent effects). Correll and his coauthors have begun data collection at a police academy and have found that, prior to receiving any weapons training, recruits “show statistically significant racial bias in both reaction times and in the decision criteria.” *Id.* at 1021.

III IMPLICATIONS

At the end of the day, this is really again a fundamental debate in terms of what is the problem in terms of violent crime. Is the problem law abiding citizens who follow the law and take all the time and all the trouble needed to get conceal-and-carry permits?²⁴⁸

– Senator David Vitter
Republican from Louisiana

The experimental evidence provided in the previous section offers an unexpected answer to what Senator Vitter must surely have supposed to be a rhetorical question. The law-abiding gun owner who believes himself to harbor no prejudice against minorities may nonetheless pose a significant threat to black Americans.

Implicit bias research suggests that large sectors of the population hold biases against minorities beyond their conscious awareness or control and that, in simulations, those individuals are more likely to shoot unarmed blacks than unarmed whites.²⁴⁹ Moreover, unlike police officers, regular citizens do not have the benefit of what appears to be the most promising tool for reducing racially biased shooting behavior: significant, ongoing firearm training.²⁵⁰

A. *Police Officer Training v. Private Gun Owner Training*

Entering police recruits undergo extensive firearm training at the academy before they are allowed to carry a weapon as an officer. The Denver Police Department, for instance, mandates that recruits receive eighty-eight hours of practical weapons training.²⁵¹ After that, officers are required to recertify each quarter through marksmanship and decisional shooting handgun qualifications.²⁵² The training is rigorous:

At the firing range, officers and recruits make shoot/don't-shoot decisions for target silhouettes that appear suddenly, either armed or unarmed; in Firearms Training System simulators (Firearms Training Systems, Inc., Atlanta, GA), they respond to an interactive

²⁴⁸ Bernie Becker & David M. Herszenhorn, *Senate Rejects Gun Rights Bill*, PITTSBURG POST-GAZETTE, July 23, 2009, at A1 (quoting Senator David Vitter).

²⁴⁹ See *supra* text accompanying notes 216–26.

²⁵⁰ See *supra* text accompanying notes 237–47.

²⁵¹ See Training Bureau, *Firearms Training*, DENVER GOV., <http://www.denvergov.org/FirearmsTraining/tabid/395385/Default.aspx> (last visited Oct. 10, 2010).

²⁵² See *id.*

video simulation of a potentially hostile suspect; and in simulated searches, they confront live actors armed with weapons that fire painful but nonlethal ammunition (e.g., paintballs, Simunition, or Air Soft pellets).²⁵³

In New York, police recruits complete five days of basic training (learning firearms safety and shooting fundamentals, among other things) and then, after passing two of three “Pistol Qualification Courses,” they have a seven-day training on making sound tactical decisions, firing a total of 1200 live fire rounds.²⁵⁴ Twice a year, they must then re-qualify by attending lectures (on topics like “the judicious use of the firearm” and “tactics to mitigate [reflexive responses]”) and completing live fire and simulations using the Firearms Training Simulator (FATS).²⁵⁵ Although some other jurisdictions are less rigorous in applying the latest marksmanship and decisional shooting technologies, many do utilize FATS.²⁵⁶ Overall, as the studies investigated in Part II document, these training experiences likely help officers to avoid the snap judgments in shooting decisions that often reflect implicit racial bias.

Private citizen gun owners receive no comparable training benefits. In the majority of states, the only requirement to purchase a handgun is passing a NICS background check.²⁵⁷ Of the few states that impose additional requirements to purchase a handgun, only California, Connecticut, Hawaii, Maryland, Michigan, New York, and Rhode Island require proof of some sort of safety training prior to purchase—none of which includes the type of shoot/don’t shoot simulation practice that appears to be effective in counteracting the influence of implicit bias.²⁵⁸

²⁵³ Correll et al., *supra* note 137, at 1007.

²⁵⁴ Training Bureau, *Firearms and Tactics Section*, N.Y. POLICE DEP’T, http://www.nyc.gov/html/nypd/html/training_nypd/firearm_tatics.shtml (last visited Oct. 10, 2010).

²⁵⁵ *See id.*

²⁵⁶ *See, e.g., Police Academy*, PHILA. POLICE DEP’T, <http://www.phillypolice.com/careers/police-academy/> (last visited Oct. 10, 2010).

²⁵⁷ NAT. RIFLE ASS’N INST. FOR LEGISLATIVE ACTION (NRA-ILA), COMPENDIUM OF STATE LAWS GOVERNING FIREARMS (2010) [hereinafter NRA-ILA COMPENDIUM], available at <http://www.nraila.org/media/PDFs/Compendium.pdf>.

²⁵⁸ *Id.* at n.11. The training requirements vary from state to state. For example, Michigan requires an applicant to answer seventy percent of questions correctly on a Basic Pistol Safety Questionnaire. *Purchasing and Registering a Pistol in Michigan*, MICH. STATE POLICE, http://www.michigan.gov/msp/0,1607,7-123-1591_3503_4654-225113--,00.html (last visited Oct. 12, 2010). In contrast, Maryland requires a safety-training course that, as of July 1, 2009, can be completed online in approximately thirty minutes.

One might expect a significantly more rigorous regulatory approach to licensing those who wish to carry a concealed weapon because such individuals are likely to bring firearms into more public settings. Yet, despite Senator Vitter's comment about "all the time and all the trouble needed to get conceal-and-carry permits,"²⁵⁹ in nearly all jurisdictions, as detailed in the fifty-state chart in Appendix A, the requirements are actually quite minimal.²⁶⁰

In order to carry a concealed handgun, individuals must obtain a permit, except in (1) Wisconsin and Illinois, where concealed carry is completely prohibited, and (2) Vermont, Arizona, and Alaska, where no license is required to carry a gun.²⁶¹ Thirty-four states have "shall issue" concealed carry laws, which establish that, as long as an individual meets the requirements for a permit set by the state legislature, a permit applicant shall receive such a permit and the issuing body has no discretionary power in the decision.²⁶² While the requirements to obtain a permit vary, most states require some form of handgun competency training (only Alabama, Georgia, Mississippi, New Hampshire, New Jersey, Pennsylvania, and South Dakota do not).²⁶³ However, no state requires the type of training that might counteract the influence of implicit bias.

New Mexico, for example, has among the most rigorous permitting requirements in the country, including the completion of an initial firearms training course of not less than fifteen hours in length and two-hour refresher training courses every two years after the issuance

Firearms Safety Training, MD. DEP'T OF PUB. SAFETY & CORR. SERVS., <http://www.mdgunsafety.com/> (last visited Oct. 12, 2010). In fact, by statute, no safety-training course offered by the Maryland Police Training Commission can last over two hours. MD. CODE ANN., PUB. SAFETY § 3-208(d)(2) (West 2010).

²⁵⁹ See *supra* note 248 and accompanying text.

²⁶⁰ That said, there are a few exceptions, such as Maryland and New Jersey, where to obtain a carry permit an individual must document a clear need for a weapon.

The requirements to carry a handgun in plain sight (open carry) also vary by state. For example, while eleven states allow open carry of a loaded handgun on foot or in a vehicle without requiring any license, seven states either completely ban or highly restrict the practice. *Open Carry of a Loaded Handgun*, OPENCARRY.ORG, <http://www.opencarry.org/opencarry.html> (last visited Oct. 12, 2010).

²⁶¹ See *infra* app. A. Alaska and Arizona also maintain permit to carry regulations for the sake of reciprocity with other states. See NRA-ILA COMPENDIUM, *supra* note 257 at n.16.

²⁶² See *infra* app. A.; see also *Right-to-Carry 2010*, NAT'L RIFLE ASS'N INST. FOR LEGISLATIVE ACTION, <http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=18> (last visited Oct. 12, 2010).

²⁶³ See *infra* app. A.

of the original license.²⁶⁴ But the specifics of the training—instruction on the safe handling, storage, and shooting of handguns; live shooting at a firing range; identification of ways to further develop shooting skills; education on weapons laws; and instruction on techniques for avoiding criminal attacks and for nonviolent dispute resolution—reveal nothing likely to help control for implicit racial bias.²⁶⁵ What is more, most states require far less than New Mexico.²⁶⁶ In Massachusetts, for example, the “NRA Home [Firearm] Safety Course,” a four-hour non-shooting course taught only in the classroom, will satisfy the training requirement for a permit to carry a concealed handgun.²⁶⁷ Although other state-approved NRA offerings, like the “NRA Basic Pistol Shooting Course,” are longer and include practice at a range, the focus at the range is not on decisional shooting; it is on properly handling and loading the weapon, following the rules of the range, and shooting from various positions, among other things.²⁶⁸

Based on the research investigated in Part II, one of the other major limitations of existing state training requirements is that they tend to come into effect only once, prior to a firearm purchase. Indeed, concealed carry permits are generally valid for between one and five years, and in many states renewing a permit does not require any new training or testing.²⁶⁹ Under the circumstances, any implicit bias control benefits gained from the initial training are likely to dissipate, just as they did for those given brief practice in the “shoot/don’t shoot” experiments who returned later for additional simulations.²⁷⁰ As Correll and his colleagues explained, “[M]ore extensive training is

²⁶⁴ N.M. STAT. ANN. §§ 29-19-6, 29-19-7 (West 2009).

²⁶⁵ *Id.* § 29-19-7.

²⁶⁶ *See infra* app. A.

²⁶⁷ *Approved Basic Firearms Safety Courses*, MASS. EXEC. OFFICE OF PUB. SAFETY & SEC., http://www.mass.gov/?pageID=eopsterminal&L=2&L0=Home&L1=Firearms+Registration+%26+Laws&sid=Eeops&b=terminalcontent&f=msp_firearmsmsp_firearms_approved_basic_firearms_safety_courses&csid=Eeops (last visited Oct. 10, 2010); *see also* MASS. GEN. LAWS. ANN. ch. 140, § 131P (West 2009). In the course, “[s]tudents are taught NRA’s three rules for safe gun handling; primary causes of firearms accidents; firearm parts; how to unload certain action types; ammunition components; cleaning; care; safe storage of firearms in the home; and the benefits of becoming an active participant in the shooting sports.” *Course Catalog*, NRA INSTRUCTORS, <http://www.nrainstructors.org/CourseCatalog.aspx> (last visited Oct. 10, 2010).

²⁶⁸ *Course Catalog*, *supra* note 267.

²⁶⁹ *See infra* app. A.

²⁷⁰ *See* Correll et al., *supra* note 137, at 1020–21.

necessary if participants are to more permanently overcome bias in behavioral responses.”²⁷¹

B. The Training Deficiency in Context

The danger to black citizens stems not only from the fact that most Americans carry implicit racial biases and that these biases can impact the shooting behavior of those who lack proper training but also from the fact that the use of guns is actually quite prevalent. As described in Part I.A, hundreds of thousands, if not millions, of Americans use guns in purported self-defense contexts each year.²⁷² Inevitably, many of these incidents take place under ambiguous circumstances or require split-second decision making: A woman is awakened in the night to see someone climbing over a back fence carrying what seems to be a handgun. A man thinks he sees a knife in a bar fight. A woman comes across a robbery in progress in which the perpetrator is holding a dark object. In these scenarios and countless others, automatic unconscious associations may largely determine how we act.

Moreover, blacks appear more likely than whites to come into contact with gun owners in exactly these types of problematic situations where the gun owner may feel threatened and have a weapon at hand. For example, according to a 2004 Department of Justice survey, “Non-Hispanic blacks comprised more than half of the defendants charged with robbery (56%).”²⁷³ Blacks are also “statistically three times more likely to commit a burglary than a non-black”²⁷⁴—a disparity with particularly grave consequences given that armed homeowners confront burglars half a million times each year.²⁷⁵ By contrast, blacks are far less likely to commit certain crimes—like bribery, fraud, and counterfeiting—that do not normally involve immediately threatening contact with individuals who may be toting weapons.²⁷⁶ If we are committed to basic fairness, equal

²⁷¹ *Id.* at 1020.

²⁷² See *supra* notes 87–88 and accompanying text.

²⁷³ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 2 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc04.pdf>.

²⁷⁴ Geoffrey R. Stone, *Race and Reason*, HUFFINGTON POST, July 26, 2009, http://www.huffingtonpost.com/geoffrey-r-stone/race-and-reason_b_245143.html.

²⁷⁵ See Robin M. Ikeda et al., *supra* note 88.

²⁷⁶ CYNTHIA BARNETT, CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME

treatment, and due process—as we purport to be—it is no response to suggest that those unarmed African Americans who were shot while committing burglaries simply got what was coming to them. Even granting that we might want to punish burglary more severely than fraud or embezzlement, if blacks are killed when they are caught stealing and whites end up in the back of a squad car, that is reason for alarm.²⁷⁷

That said, it is critical to understand that implicit racial bias endangers both innocent blacks and those who are perpetrating crimes. There are countless opportunities for African Americans to be confronted with firearms based on completely innocent conduct. Indeed, part of the reason that black police officers are at a greater risk of being assaulted with a firearm than white police officers may be shooter bias.²⁷⁸ This was precisely the conclusion of a recent New York state task force investigating the causes of mistaken-identity shootings of police officers: “[R]ace can, and often does, play a significant role in these [mistaken-identity] confrontations—at least in the escalation of these confrontations into fatal tragedies.”²⁷⁹

Based purely on numbers, the overall threat to minorities appears to be far greater than the bigoted attacks that have received so much attention from the press in recent months and years.²⁸⁰ In 2008, for example, there was only one murder recorded in the United States motivated by anti-black bias, and there were 386 aggravated assaults.²⁸¹ Putting this in context, it is estimated that approximately

REPORTING (UCR) DATA 5 (1999), *available at* <http://www.fbi.gov/ucr/whitecollarforweb.pdf> (reporting that 84.9% of bribery incidents, 70.6% of fraud incidents, and 75.8% of counterfeiting incidents were committed by white offenders).

²⁷⁷ Cf. Eberhardt et al., *supra* note 204, at 385 (documenting that the stereotypicality of black defendants predicts the likelihood that they will be sentenced to death in cases involving white victims).

²⁷⁸ See Table 27, *Law Enforcement Officers Feloniously Killed: Type of Weapon, 1997–2006*, FED. BUREAU OF INVESTIGATION, <http://www2.fbi.gov/ucr/killed/2006/table27.html> (last visited Oct. 12, 2010).

²⁷⁹ N.Y. STATE TASK FORCE ON POLICE-ON-POLICE SHOOTINGS, REDUCING INHERENT DANGER: REPORT OF THE TASK FORCE ON POLICE-ON-POLICE SHOOTINGS 39 (2010) [hereinafter N.Y. STATE TASK FORCE], *available at* http://www.state.ny.us/governor/reports/pdf/Police_on_Police.pdf; see also *id.* at iii (“As far as we can determine, 1982 was the last year in which an off-duty, white police officer was killed in a mistaken-identity, police-on-police shooting anywhere in the United States.”).

²⁸⁰ See *supra* notes 90–91, 119–20 and accompanying text.

²⁸¹ 2008 *Hate Crime Statistics*, Table 4, FED. BUREAU OF INVESTIGATION (2008), http://www2.fbi.gov/ucr/hc2008/data/table_12.html. In total, there were 3413 hate crime offenses referencing anti-black bias recorded in 2008, more than two-thirds of which were either intimidation or destruction/damage/vandalism. *Id.*

a million people were wounded or killed by guns in the last ten years²⁸² and that over fifty percent of those people were black.²⁸³ Of course, many of these shootings may not have been significantly influenced by implicit racial bias against African Americans, but even with an extremely conservative estimate, assuming, *arguendo*, that ninety-eight or ninety-nine percent of shootings of blacks were completely free from any implicit bias effect (an estimate that seems unrealistically high in light of the evidence of the pervasiveness of implicit bias in the U.S. population and its impact on behavior), that would mean that race affected the shooting of five to ten thousand blacks in the last decade. As damaging as they are, hate crimes are both rare and generally nonlethal. By contrast, when implicit bias influences shooting behavior, the result is frequently a life-or-death scenario.

What is more, the impact of shooter bias is likely to be getting worse because, as documented in Part I.A, more people are buying guns.²⁸⁴ And, just as important, people have greater rights to firearm possession in a variety of contexts as a result of changes in the law.²⁸⁵ *Heller* and *McDonald* ensured that Americans may keep handguns in their homes for self-defense.²⁸⁶ New legislation has allowed guns to be legally brought into various environments where they were previously prohibited: national parks, churches, bars, and trains, to name just a few.²⁸⁷ And it is not only that the law has changed but also that carrying weapons into public settings has become more socially acceptable.²⁸⁸ More Americans are likely to have more guns in more different interactions than ever before, which means more opportunities for implicit bias to impact shooting decisions. The aftershocks may be felt particularly strongly in major cities, which

²⁸² Brief of Amici Curiae Brady Center, *supra* note 41, at 11; *see also WISQARS Nonfatal Injury Reports*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (last visited Oct. 10, 2010); *WISQARS Injury Mortality Reports, 1999–2007*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (last visited Oct. 10, 2010).

²⁸³ ZAWITZ & STROM, *supra* note 90.

²⁸⁴ *See supra* text accompanying notes 81–83.

²⁸⁵ *See supra* text accompanying notes 41–44, 47–55.

²⁸⁶ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

²⁸⁷ *See supra* text accompanying notes 47–53.

²⁸⁸ *See supra* text accompanying notes 67–69.

both had the most stringent gun restrictions prior to *Heller* and *McDonald* and have the largest concentrations of minority citizens.²⁸⁹ In the coming years in such urban areas, shooter bias may have a particularly devastating effect on blacks. And the fact that many neighborhoods in big cities continue to be racially segregated may prove to be less of a protection than might be imagined given the evidence that both blacks and whites exhibit equivalent levels of shooter bias against African Americans.²⁹⁰

Finally, “make-my-day” self-defense laws may be altering the shooting decision itself in a way that makes implicit bias more of a threat.²⁹¹ The more permissive legal regime removes a check on pulling the trigger and encourages automaticity. Experiencing any threat? Shoot first and ask questions later. Under such circumstances, blacks are particularly at risk because interrupting the pathway between the split-second judgment of dangerousness based on race and the decision to fire is already an uphill battle.

Overall, the United States appears to be in the midst of a transfer of power from professional state law enforcement to amateur private citizen law enforcement.²⁹² Armed private citizens are increasingly tasked as our peace keepers—our first line of defense against criminals in our cities. Yet, a lack of training leaves them unprepared to take on this role, seriously endangering our minority population.²⁹³ And, in an ironic twist, as private citizens are empowered, the professional state law enforcement officers whom they supplement or replace may be the ones who are most at risk, particularly black

²⁸⁹ For example, Washington, D.C., Chicago, and New York—three of the cities with the most restrictive firearms laws prior to *Heller*—are home to over 3.5 million African Americans (blacks make up 60.0%, 36.8%, and 26.6% of each city’s respective total population). JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION: 2000 at 7 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

²⁹⁰ See Correll et al., *The Police Officer’s Dilemma*, *supra* note 216, at 1324.

²⁹¹ See *supra* text accompanying notes 70–72.

²⁹² See *supra* text accompanying notes 92–101.

²⁹³ It is worth pointing out that having private citizens making shooting decisions rather than police officers is problematic not only because police officers benefit from far greater training that may help reduce the impact of implicit biases, but also because there are numerous other checks on officers using guns. There are mechanisms to prevent members of the police from working when they are intoxicated, on drugs, suffering from lack of sleep, or experiencing age-related decreases in cognitive functioning, among other things, all of which may impact shoot/don’t shoot decision making. Private citizens, by contrast, face no similar prohibitions. To purchase a gun, a person does not even have to pass an eye test. See Kolpack, *supra* note 183.

undercover and off-duty police officers.²⁹⁴ With members of the public increasingly carrying weapons into public spaces and encouraged to use them for protection, it is likely to be very dangerous for nonuniformed black officers to draw their weapons, even when responding to emergency situations.

IV

A POTENTIAL SOLUTION

An association should be organized. . . to promote and encourage rifle shooting on a scientific basis.²⁹⁵

– William Conant Church
Co-founder of the National Rifle Association

Accepting the seriousness of the problem of implicit racial bias influencing shooting behavior in an increasingly pro-firearm environment, it would, nonetheless, seem difficult if not impossible to implement any meaningful reforms to address it. However, a realistic, practical policy prescription does exist. In particular, this Article argues that states ought to enact requirements that gun owners enroll in ongoing firearm training.

A. *New Firearm Training Requirements*

In contrast to most existing regulations, the new proposed licensing requirements would make training mandatory for anyone seeking to own a firearm. In moving to a mandatory regime, states might elect to require greater training for individuals seeking to carry their weapons in public, but a baseline would be set for all gun owners.

In addition, unlike current firearm training courses—whose emphasis is solely on educating students about gun laws; safe storage; weapon cleaning, loading, and firing; and other issues—new regulations would mandate firearm-simulation training and shooting practice aimed directly at reducing the impact of implicit bias.²⁹⁶

²⁹⁴ Since 2004, off-duty officers have been authorized to carry their weapons with them anywhere in the country. N.Y. STATE TASK FORCE, *supra* note 279, at 108.

²⁹⁵ JAMES B. TREFETHEN, *AMERICANS AND THEIR GUNS* 34 (1967) (quoting William Conant Church, 1871).

²⁹⁶ To the extent that other proposals to improve current licensing regimes have mentioned training, they have involved reforms unlikely to address the problems highlighted in this Article and have largely focused on gaining wider acceptance for conventional training requirements already adopted in certain states. The Legal Community Against Violence, for example, has argued for “safety training,” “hands-on

Although necessarily less extensive, this would mirror the substance of the existing training that law enforcement officers receive in some jurisdictions. Just like officers in New York and elsewhere, prior to being allowed to possess a gun in public, private citizens would be required to practice their accuracy in simulated encounters and to work to reduce their error rates.²⁹⁷ And, like officers, they would be required to recertify by periodically retraining. Certain states might elect to waive recertification training in instances where gun owners provided documentation of a certain number of hours of approved decisional shooter practice during the licensed period.

Initially, citizen training regimes might make use of existing technologies and programs used to train police officers, but over time, simulations could be specifically designed to be even more effective in reducing racially biased shooting behavior by members of the public. This would involve, among other things, creating simulations that (1) are increasingly realistic, (2) model the exact interactions in which private citizens are most likely to use their weapons (e.g., home burglaries or robberies), and (3) ensure that the race of suspects is unrelated to the presence of weapons. The success of such programs would depend, in part, on continued research on debiasing and data collection on shooter bias, which would allow state and local governments to hone the details of training requirements to minimize the costs to gun owners and the general public and to maximize effectiveness.²⁹⁸

testing, including firing testing, to demonstrate safe use of firearms,” and “written testing to demonstrate knowledge of applicable firearm laws.” *LEGAL CMTY. AGAINST VIOLENCE*, *supra* note 181, at 186.

²⁹⁷ Individual states could determine whether or not to require an exam following training. If states are able to constitutionally bar individuals from owning a gun based on failing a written safety exam, barring individuals based on their performance on a realistic shooting simulation seems legally unproblematic. And, from a purely public safety perspective, it would make sense that any individual unable to control for implicit racial bias after extensive training would be disqualified from owning a weapon, just as it makes sense to bar someone convicted of a violent felony from owning a firearm. However, this Article does not champion such an approach at this time. Politically, including such a bar is likely to be controversial and the benefits in terms of controlling for implicit bias might be largely realized by requiring extensive training without a final exam. In addition, because such an approach has the potential to completely prevent an individual from enjoying gun ownership (in contrast to the minor resource commitment involved in completing new training), it seems prudent to wait to act until more data are collected and our understanding of shooter bias is further developed.

²⁹⁸ This Article does not advocate collecting individualized data on shooter bias, but anonymous collection like that completed in earlier shooter studies is likely to yield valuable insights without endangering any privacy rights. With ongoing implicit bias research, other educational components outside of decisional shooting practice might be

In turn, this research and experience could help to reshape police academy practices and ongoing officer training. Not all police departments require the same degree of rigor in their shooting simulations, and few if any have programs specifically designed to address implicit bias.²⁹⁹ Advances in private citizen debiasing could yield significant benefits to state and local governments eager to reduce the number of innocent minorities shot by police officers. Indeed, New York has already recognized the need to address unconscious racial bias through systematic research on the shooting decision making of officers and the development of interactive training that “continue[s] throughout an officer’s career and across all ranks.”³⁰⁰ It is likely that an enriched understanding of shooter bias could also be greatly beneficial to the U.S. military, given the need to reduce friendly fire and civilian deaths.³⁰¹

B. Eight Reasons That New Training Requirements Are Feasible

New training requirements are less likely to be met with strong opposition and less likely to result in negative side effects than other proposals aimed at protecting minority citizens from racially biased gun use.

First, new training mandates are unlikely to run into serious constitutional issues. The Supreme Court made clear in *Heller* and *McDonald* that nothing in the opinion was meant to qualify the right of the government to “impos[e] conditions and qualifications on the

added to further improve accuracy and speed in decision making. See, e.g., Glaser & Knowles, *supra* note 190, at 171.

²⁹⁹ See N.Y. STATE TASK FORCE, *supra* note 279, at 51 (“Most officers nationwide undergo mandatory firearms requalification to demonstrate proficiency with firearms safety and to practice *how* to shoot, but not enough training is geared toward making the shoot/don’t shoot decision and to handling the difficult and dangerous situations that many officers inevitably encounter.”).

³⁰⁰ *Id.* at 56. In 2010, the New York State task force empanelled by Governor David A. Paterson to study mistaken-identity shootings of officers recommended “that both federal and state governments accelerate the development and training to *measurably reduce unconscious racial bias in shoot/don’t shoot decisions*.” *Id.* at iv. As a result, Correll and his colleagues have been testing NYPD police recruits for implicit racial bias in shoot/don’t shoot decisions at admission, at the completion of training, and after entering the field. *Id.* at 40. The hope is that this will shed further light on the impact of police training on shooting decision making, such that the NYPD will be able to identify the optimal amount and intensity of training aimed at reducing racial bias in officers. *Id.*

³⁰¹ Fleming et al., *supra* note 226, at 202 (“[U]nderstanding the mechanisms underlying the decision to shoot can lead to better training protocols for military personnel and fewer casualties due to misidentification of threat or friendly fire.”).

commercial sale of arms.”³⁰² As Dennis Henigan has noted, this is “a category broad enough to include background checks, waiting periods, licensing, registration, safety training, limits on large-volume sales, etc.”³⁰³ Although the Supreme Court may offer further clarification in the future, a majority of Justices appear to be convinced that there is a broad set of gun control regulations that remain presumptively lawful.³⁰⁴

Moreover, of any gun ownership requirements, training provisions seem particularly unlikely to be successfully challenged. As Adam Winkler has explained, “No mainstream scholar of the Second Amendment denies that government must have the authority to adopt legislation . . . requiring education and training”³⁰⁵ Even those scholars who have argued for an individual-rights interpretation of the Second Amendment, and taken a very limited view of the meaning of “well regulated” in the text, grant that the Amendment’s language referred to a militia “that was well-trained and equipped.”³⁰⁶ And, in fact, this is the understanding articulated by the majority in *Heller*: “[T]he adjective ‘well-regulated’ implies nothing more than the imposition of proper discipline and training.”³⁰⁷ It seems unlikely that requiring shooter training would be viewed as anything other than a reasonable exercise of state “police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”³⁰⁸

³⁰² District of Columbia v. *Heller*, 128 S. Ct. 2783, 2817 (2008); McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010).

³⁰³ Henigan, *supra* note 174, at 1195.

³⁰⁴ See Cook et al., *supra* note 80, at 1059–60 (2009) (“One can easily imagine the 5–4 vote [in *Heller*] going the other way had the District permitted a law-abiding citizen to store one handgun in the home, but required handgun training, registration, and a trigger lock—except when and if self-defense became necessary.”); Henigan, *supra* note 174, at 1197 (“The language strongly indicates that one or more of the Justices in the [*Heller*] majority were willing to join Scalia’s opinion only if it allowed substantial continued deference to legislative decisionmaking on gun policy.”).

³⁰⁵ Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 707 (2007).

³⁰⁶ Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 474 (1995); see also, e.g., Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1208 (1996) (“The eighteenth century usage of ‘regulate’ had the more specialized meaning of ‘practiced in the use of arms, properly trained, and/or disciplined.’” (citing Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA. L. REV. 65, 92 n.133 (1983))).

³⁰⁷ *Heller*, 128 S. Ct. at 2800.

³⁰⁸ *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotation marks omitted).

The training requirements proposed in this Article apply equally to everyone and do not allow for unbridled discretion based on vague standards like some licensing regimes.³⁰⁹ Nor do they deny anyone the right to possess a firearm.³¹⁰ They are merely a reasonable safeguard, grounded in empirical evidence, to protect particularly vulnerable members of the public. And they seem to have ready analogies with respect to other state and federal licenses. You may have a right to a gun, but you must be trained in how to use it, just as you must be trained before you are allowed to operate a plane, crane, or semi.³¹¹ It makes little sense that a police officer should have to undergo training to be allowed to carry a gun, but private citizens should not. Under the proposed state provisions, private citizens would not be asked to do anything more than what our trusted law enforcement officers already do—and, in fact, with respect to time commitment, they would be asked to do much less. The only alteration to the regulatory landscape that the new training codes would create would be to even the playing field so that everyone who chooses to carry a weapon is treated equally.

Second, a robust training regime is far less likely to be attacked by the NRA than proposals for other restrictions or qualifications on purchasing weapons. For one thing, by removing the viability of a general gun ban, *Heller* has eliminated the slippery slope argument that licensing and registration regimes are likely to lead to firearm prohibition—a proven strategy for the NRA in the past.³¹² Furthermore, as the above quotation by William Conant Church suggests, the association's history references a strong commitment to improving shooter accuracy grounded in "science"—and the best science today on implicit bias suggests that, to reduce incidents of shooter error, individuals need greater firearm schooling. This does not conflict with the NRA's stated goals; it aligns with them: "[T]he NRA has, since its inception, been the premier firearms education organization in the world."³¹³ The New York charter granted to the

³⁰⁹ See Winkler, *supra* note 305, at 722.

³¹⁰ *Id.* at 723.

³¹¹ See, e.g., *Pilot Training*, FED. AVIATION ADMIN., <http://www.faa.gov/pilots/training/> (last visited Oct. 10, 2010); *State Licensing Requirements*, NAT'L COMM'N FOR THE CERTIFICATION OF CRANE OPERATORS (NCCCO), <http://www.nccco.org/licensing/index.html> (last visited Oct. 10, 2010).

³¹² Henigan, *supra* note 174, at 1208.

³¹³ A *Brief History of the NRA*, NAT'L RIFLE ASS'N HEADQUARTERS, <http://www.nrahq.org/history.asp> (last visited Oct. 10, 2010).

National Rifle Association in 1871 provided that the purpose of the organization was “to promote rifle practice, and for this purpose to provide a suitable range or ranges in the vicinity of New York . . . and to promote the introduction of a system of aiming drill and target firing among the National Guard of New York and the militia of other states.”³¹⁴ Since 1960, the NRA has been the only national trainer of law enforcement officers, and there are currently more than 11,000 NRA-certified police and security firearms instructors.³¹⁵ The NRA also already trains members of the public, with over 50,000 certified instructors training approximately 750,000 firearms owners each year.³¹⁶ Thus, the stage is already set for the mandatory training reforms suggested above, which embody the NRA’s commitment to instruction on “safe, effective, firearm handling.”³¹⁷

Third, even if the NRA opposed new state training legislation, it does not follow that increased training requirements would be too unpalatable to gun owners to be politically feasible. Recent survey data suggest that most gun owners are actually quite a bit more moderate than NRA rhetoric would suggest when it comes to gun controls.³¹⁸ Indeed, eighty-two percent of NRA members are in favor of prohibiting suspected terrorists from buying guns, sixty-nine percent are in favor of background checks for all gun show sales, and seventy-eight percent are in favor of requiring gun owners to report lost and stolen guns.³¹⁹ Most critical to this Article, the majority of NRA members support requiring those purchasing firearms to undergo mandatory safety training.³²⁰ These numbers suggest that many gun owners are not the single-minded zealots that lobbyists and politicians conjure up. They do not blindly adhere to the maxim that “Americans should not have their Second Amendment rights

³¹⁴ TREFETHEN, *supra* note 295, at 10.

³¹⁵ *Law Enforcement Training*, NAT’L RIFLE ASS’N HEADQUARTERS, <http://www.nrahq.org/law/training/training.asp> (last visited Oct. 10, 2010).

³¹⁶ *A Brief History of the NRA*, *supra* note 313.

³¹⁷ *Law Enforcement Training*, *supra* note 315.

³¹⁸ Editorial, *Gun Owners, Unfiltered*, N.Y. TIMES, Dec. 20, 2009, <http://www.nytimes.com/2009/12/21/opinion/21mon4.html>.

³¹⁹ MAIG Press Release: *New Poll By Frank Luntz Shows NRA-Members and Other Gun Owners Support Sensible Measures to Keep Guns Out of the Hands of Criminals*, MAYORS AGAINST ILLEGAL GUNS (Dec. 10, 2009), <http://www.mayorsagainstillegalguns.org/html/media-center/pr012-09.shtml> (the percentages are considerably higher for non-NRA member gun owners).

³²⁰ See Douglas S. Weil & David Hemenway, *I Am the NRA: An Analysis of a National Random Sample of Gun Owners*, 8 VIOLENCE & VICTIMS 353, 361 (1993).

restricted for any reason,”³²¹ as Senator Roger Wicker has suggested. Such proclamations make for powerful sound bites and foolish policy. Most American gun owners care about preserving their freedoms as law-abiding citizens to possess guns *and about ensuring a safe society*.

Fourth, gun training is not onerous like some other types of training that are required for licensing. Even without formal requirements, many gun owners voluntarily practice their shooting for recreation;³²² indeed, they find going to the range fun. Further, it is worth noting that firearm simulations are already incredibly popular as a means of entertainment. In recent years, first-person shooter video games have become ubiquitous and remain among the top sellers.³²³ Thus, a training requirement is unlikely to force gun owners to significantly alter their routines and caters to existing preferences. And with more research in the future, it might be possible to reduce existing training requirements that do not appear to have meaningful safety benefits such that total mandatory training is kept to a minimum.³²⁴

Fifth, and related, the proposed training requirements would not necessitate any major alterations to present institutions or structures, and they are unlikely to be prohibitively expensive to implement. Although new courses would need to be developed over time to better reflect advances in debiasing science, as discussed previously, trainers and ranges already exist. Just as important, companies are already producing the shooter simulation technology, which is sold to police departments around the country.³²⁵ No new industry would need to

³²¹ Editorial, *The Senate Brandishes a Gun at Amtrak*, N.Y. TIMES, Sept. 17, 2009, <http://www.nytimes.com/2009/09/18/opinion/18fri3.html> (quoting Senator Roger Wicker, a Republican from Mississippi).

³²² Note, however, that normal target practice at a range is unlikely to yield benefits with respect to reducing the impact of implicit racial bias.

³²³ Frank Cifaldi, *Analysts: FPS “Most Attractive” Genre for Publishers*, GAMASUTRA (Feb. 21, 2006), http://www.gamasutra.com/php-bin/news_index.php?story=8241.

³²⁴ Some existing research, for example, suggests that, despite rhetoric to the contrary, conventional firearms training on safe gun handling and storage does not appear to have any effect on whether individuals keep guns loaded. See Andrew J. McClurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More “Smoking Gun,”* 51 HASTINGS L.J. 953, 987 (2000) (citing Douglas S. Weil & David Hemenway, *Loaded Guns in the Home: Analysis of a National Random Survey of Gun Owners*, 267 J. AM. MED. ASS’N 3033, 3035 (1992)).

³²⁵ One of the main leaders is Meggitt Training Systems, which sells “virtual training capabilities and live fire training systems” to “law enforcement and security agencies

be created, and many products could simply be repurposed.³²⁶ Although purchasing simulation equipment sufficient to cover all gun owners would entail costs, jurisdictions could reasonably pass off much of the expense to those seeking licenses, as many of these people have already shown themselves willing to spend money on practicing at firing ranges (not to mention on playing paintball and first-person shooter video games, among other similar activities). For example, a two-hour beginner firearms training class at LAX Firing Range in Los Angeles costs \$99.00, and normal range fees are \$18.00 if you bring your own ammunition and weapon.³²⁷ If passing off the cost to gun owners turned out to be politically infeasible, jurisdictions could opt for more basic and less costly technologies. The computer-based shooter simulation used by Correll and his colleagues is available for free on the Internet; and although training on it is less likely to generalize to actual shooter scenarios faced by members of the public than more advanced and realistic simulations, it may still prove to be effective as a debiasing tool.³²⁸ Alternatively, state or local governments might reasonably elect to subsidize the costs on public safety grounds much as they do for motorcycle training in many jurisdictions.³²⁹ Indeed, the outlays for new firearm simulation equipment might be largely offset by reduced emergency responder, medical, and other costs currently arising from preventable race-implicated shootings.

Sixth, meaningful firearm training and recertification is likely to bring benefits to society in addition to reducing the threat to African Americans. As the various shooter bias studies document, training

around the world.” *About Meggitt Training Systems*, MEGGITT TRAINING SYS., <http://www.meggitttrainingsystems.com/main.php?id=66> (last visited Oct. 10, 2010).

³²⁶ Indeed, some police departments have already allowed members of the public to utilize their firearms simulators. See, e.g., Jim McKay, *Firearms Simulator Helps Police Prepare for Crisis Situations*, GOV’T TECH. (Aug. 10, 2008), <http://www.govtech.com/public-safety/102478594.html> (discussing Ulster County, New York’s new citizens’ police academy); *Citizens Police Academy Registration Open*, S. BRUNSWICK POLICE DEP’T (Jan. 5, 2010), http://www.twp.south-brunswick.nj.us/index.asp?Type=B_PR&SEC={632BF4B0-3CDB-402A-A487-625F58FEED45}&DE={31A5AB55-35AC-4ADB-BE49-2E59019CAB6A} (offering a free twelve-week course to citizens, including training with a Firearms Training Systems simulator).

³²⁷ *Price List*, LAX FIRING RANGE, <http://www.laxrange.com/pricelist.shtm> (last visited Oct. 10, 2010).

³²⁸ This, again, shows the need for continued rigorous study of shooter bias.

³²⁹ See, e.g., *Frequently Asked Questions*, PA. MOTORCYCLE RIDER EDUC. <http://pmre.net/FAQs.htm#1> (last visited Oct. 10, 2010) (offering half-price subsidy from the State of Washington).

not only minimizes shooting errors relating to firing on unarmed blacks but also improves accuracy more generally.³³⁰ It also increases the speed of correct decision making.³³¹ Reform efforts could, thus, be framed in race-neutral ways, which might make new training requirements more politically plausible. Cast in such a light, the purpose of the new regulations would be to reduce error rates across the board in the interests of public safety. The idea would be that new training requirements would help to protect both innocent would-be-shooter victims *and innocent gun owners*. As Correll and his coauthors' work highlights, unconscious biases may result not only in shooting harmless, unarmed individuals but also in *not shooting* dangerous, armed individuals.³³² Hence, a new training regime could be accurately framed as a necessary step in ensuring that citizens are able to overcome cognitive impediments to protecting themselves in crucial moments where time is of the essence.

Seventh, this proposal is narrowly tailored in the sense that it is unlikely to have negative effects on other important rights enjoyed by citizens. As discussed at the beginning of this Article, in the wake of several bigoted attacks, some have argued for clamping down on hate speech with the idea that it will reduce race-driven crimes. The danger with such approaches, however, is that they may quickly result in a less democratic society.³³³ As Phyllis B. Gerstenfeld has summarized, "Those charged with enforcing the laws have sometimes overstepped the bounds of their authority—and have infringed upon First Amendment rights—when they have attempted to investigate or silence extremists."³³⁴ With respect to implicit racial bias, regulators might clamp down on stereotypical depictions of African Americans as violent, aggressive, and criminal in movies, television programs, and advertising with the hope of debiasing the population,³³⁵ but such significant government intervention might come at a real cost to core values, like freedom of speech and the independence of journalists.

Eighth, and finally, a training regime is likely to prove to be a far more efficient use of scarce resources to minimize race-based violence than alternatives. Monitoring proposals, like the new Lone

³³⁰ See, e.g., Plant & Peruche, *supra* note 216, at 182.

³³¹ See, e.g., Correll et al., *supra* note 137, at 1020.

³³² See, e.g., Correll et al., *The Police Officer's Dilemma*, *supra* note 216, at 1325; Correll et al., *supra* note 137, at 1007; Plant et al., *supra* note 238, at 147.

³³³ See Hickey, *supra* note 22.

³³⁴ Gerstenfeld, *supra* note 119.

³³⁵ See Kang, *supra* note 216, at 1572–89.

Wolf Initiative, aimed at tracking potential bigoted attackers, require much investment and promise little definite payoff.³³⁶ Similarly, hate crime prosecutions by the Department of Justice can have significant value, but they are also costly, time-consuming, controversial, and occur after the harm to a minority has already been perpetrated.³³⁷ Required training for gun owners by contrast may prevent thousands of racially biased shootings with comparatively little government expenditure (in terms of public tax dollars spent per prevented harm).

CONCLUSION

A sighted shooter is probably more dangerous because they can see something scary and pull their gun in haste.³³⁸

— Carey McWilliams
A blind man who was granted
concealed weapons permits

At a recent service in which he invited his congregation to bring their guns to church, Ken Pagano, pastor of the New Bethel Church in Louisville, Kentucky, told members, “There is nothing to be afraid of from a legal firearms owner.”³³⁹

As this Article has investigated, Pastor Pagano’s words reflect and embody a powerful narrative in our country about rational shooters: it is written on our car bumpers, trumpeted by radio show hosts, and forms the bedrock beneath the Supreme Court’s approach in *Heller* and *McDonald*. Yet, the best empirical evidence suggests that it is inaccurate. There *is* something to be afraid of.

On a basic level, what the implicit bias studies document is a quirk in our shooting behavior that results in bullets not going where we intend them. It is not much different than if scientists discovered that most people had a tendency to flinch involuntarily when they used their guns, causing errant—and dangerous—trajectories. In that scenario, it would be hard to argue against a state requiring gun owners to spend a few hours practicing so that they could learn to control for the twitch. It would just seem like the sensible thing to do; gun owners could feel safer knowing that they were not going to miss

³³⁶ Johnson, *supra* note 24; *see also* Gerstenfeld, *supra* note 119.

³³⁷ *See* Urbina, *supra* note 24; Johnson, *supra* note 24.

³³⁸ Kolpack, *supra* note 183.

³³⁹ The Lede, *A Congregation of the Armed and Faithful*, N.Y. TIMES, June 27, 2009, <http://thelede.blogs.nytimes.com/2009/06/27/armed-and-faithful-count-down/?hp>.

in a critical moment, and we could save the lives of all of those innocents who might otherwise be hit by errant bullets.

This Article presents a similarly practical and politically acceptable approach to dealing with a known firearm safety hazard—a threat to minority citizens that is far graver than the risks of hate groups and hate crimes that have received so much recent attention by journalists, academics, and policy makers. Whether we act to protect thousands of Americans will come down to our ability to reconsider what really animates human action.

APPENDIX A
STATE CONCEAL AND CARRY REQUIREMENTS³⁴⁰

	Alabama	Alaska	Arizona	Arkansas
Requires a permit or license to carry a concealed weapon	Yes	No license required	No license required	Yes
May issue/shall issue	May issue			Shall issue
Issues permits to nonresidents	No			No
Requires training	No			Yes
Training exceeds NRA standards ³⁴¹	No			No
Training requires live fire shooting practice	No			Yes
Training requires a written firearm safety exam	No			Yes
Training requires a performance firearm safety exam	No			No
Training requires a "shoot/don't shoot" simulation	No			No
Cost of license or permit	\$5.00-15.00			\$144.25
Period for which license or permit is valid	One year			Five years

³⁴⁰ All information in Appendix A was collected using state statutes and online resources. A complete list of the implicated Web sites is available with the author. In some cases local officials were called to confirm ambiguous information. In addition, a number of cities also regulate firearms, but they have been left out of the chart for space reasons. *See, e.g.*, LEGAL CMTY. AGAINST VIOLENCE, *supra* note 181, at xv ("Chicago, Cleveland, Columbus, Hartford, New York City and Omaha generally do not allow carrying concealed weapons, but Hartford, New York City and Omaha have permitting schemes that would allow some concealed carry.").

³⁴¹ The NRA offers a range of courses that are approved by states as meeting firearm safety course requirements. *See Course Catalog, supra* note 267.

APPENDIX A (continued)

	California	Colorado	Connecticut	Delaware
Requires a permit or license to carry a concealed weapon	Yes	Yes	Yes	Yes
May issue/shall issue	May issue	Shall issue	May issue	May issue
Issues permits to nonresidents	No	No	Yes	No
Requires training	Yes	Yes	Yes	Yes
Training exceeds NRA standards	Yes	No	No	Yes
Training requires live fire shooting practice	Yes	Yes	Yes	Yes
Training requires a written firearm safety exam	Yes	No	Yes	Yes
Training requires a performance firearm safety exam	No	No	Yes	Yes
Training requires a "shoot/don't shoot" simulation	No	No	No	No
Cost of license or permit	\$95.00	\$152.50	\$140.00	\$35.00
Period for which license or permit is valid	Two years	Five years	Five years	Two years

APPENDIX A (continued)

	Florida	Georgia	Hawaii	Idaho
Requires a permit or license to carry a concealed weapon	Yes	Yes	Yes	Yes
May issue/shall issue	Shall issue	Shall issue	May issue	Shall issue
Issues permits to nonresidents	Yes	No	Yes	Yes
Requires training	Yes	No	Yes	Yes
Training exceeds NRA standards	No	No	No	No
Training requires live fire shooting practice	No	No	Yes	No
Training requires a written firearm safety exam	No	No	No	No
Training requires a performance firearm safety exam	No	No	Yes	No
Training requires a "shoot/don't shoot" simulation	No	No	No	No
Cost of license or permit	\$117.00	\$65.00	Varies by county	\$20.00
Period for which license or permit is valid	Seven years	Five years	One year	Five years

APPENDIX A (continued)

	Illinois	Indiana	Iowa	Kansas
Requires a permit or license to carry a concealed weapon	No such licenses issued	Yes	Yes	Yes
May issue/shall issue		Shall issue	May issue	Shall issue
Issues permits to nonresidents		Yes	No	No
Requires training		Yes	Yes	Yes
Training exceeds NRA standards		No	Yes	No
Training requires live fire shooting practice		Yes	Yes	Yes
Training requires a written firearm safety exam		Yes	Yes	No
Training requires a performance firearm safety exam		No	Yes	No
Training requires a "shoot/don't shoot" simulation		No	No	No
Cost of license or permit		\$45.00	Varies by county	\$150.00
Period for which license or permit is valid		Four years/lifetime	One year	Four years

APPENDIX A (continued)

	Kentucky	Louisiana	Maine	Maryland
Requires a permit or license to carry a concealed weapon	Yes	Yes	Yes	Yes
May issue/shall issue	No	Shall issue	Shall issue	May issue
Issues permits to nonresidents	No	No	Yes	Yes
Requires training	Yes	Yes	Yes	Yes
Training exceeds NRA standards	No	No	No	No
Training requires live fire shooting practice	Yes	Yes	Yes	No
Training requires a written firearm safety exam	Yes	Yes	Yes	Yes
Training requires a performance firearm safety exam	No	No	No	No
Training requires a "shoot/don't shoot" simulation	No	No	No	No
Cost of license or permit	\$60.00	\$100.00	\$35.00	\$112.25
Period for which license or permit is valid	Five years	Four years	Four years	One year

APPENDIX A (continued)

	Massachusetts	Michigan	Minnesota	Mississippi
Requires a permit or license to carry a concealed weapon	Yes	Yes	Yes	Yes
May issue/shall issue	May issue	Shall issue	Shall issue	Shall issue
Issues permits to nonresidents	Yes	No	Yes	No
Requires training	Yes	Yes	Yes	No
Training exceeds NRA standards	No	No	No	No
Training requires live fire shooting practice	No	Yes	Yes	No
Training requires a written firearm safety exam	No	Yes	Yes	No
Training requires a performance firearm safety exam	No	No	No	No
Training requires a "shoot/don't shoot" simulation	No	No	No	No
Cost of license or permit	\$100.00	\$105.00	\$75.00	\$132.00
Period for which license or permit is valid	Five years	Four years	Five years	Four years

APPENDIX A (continued)

	Missouri	Montana	Nebraska	Nevada
Requires a permit or license to carry a concealed weapon	Yes	Yes	Yes	Yes
May issue/shall issue	Shall issue	Shall issue	Shall issue	Shall issue
Issues permits to nonresidents	No	No	No	Yes
Requires training	Yes	Yes	Yes	Yes
Training exceeds NRA standards	No	No	No	No
Training requires live fire shooting practice	Yes	Yes	Yes	Yes
Training requires a written firearm safety exam	Yes	Yes	Yes	Yes
Training requires a performance firearm safety exam	No	No	No	No
Training requires a "shoot/don't shoot" simulation	No	No	No	No
Cost of license or permit	\$100.00	\$60.00	\$100.00	\$100.00
Period for which license or permit is valid	Three years	Four years	Five years	Five years

APPENDIX A (continued)

	New Hampshire	New Jersey	New Mexico	New York
Requires a permit or license to carry a concealed weapon	Yes	Yes	Yes	Yes
May issue/shall issue	Shall issue	May issue	Shall issue	May issue
Issues permits to nonresidents	Yes	Yes	No	No
Requires training	No	No	Yes	Yes
Training exceeds NRA standards	No	No	Yes	No
Training requires live fire shooting practice	No	No	Yes	Yes
Training requires a written firearm safety exam	No	No	Yes	Yes
Training requires a performance firearm safety exam	No	No	No	No
Training requires a "shoot/don't shoot" simulation	No	No	No	No
Cost of license or permit	\$10.00	\$20.00	\$100.00	\$150.00
Period for which license or permit is valid	Four years	Two years	Four years	Lifetime

APPENDIX A (continued)

	North Carolina	North Dakota	Ohio	Oklahoma
Requires a permit or license to carry a concealed weapon	Yes	Yes	Yes	Yes
May issue/shall issue	Shall issue	Shall issue	Shall issue	Shall issue
Issues permits to nonresidents	No	Yes	No	No
Requires training	Yes	Yes	Yes	Yes
Training exceeds NRA standards	No	Yes	No	No
Training requires live fire shooting practice	Yes	Yes	Yes	Yes
Training requires a written firearm safety exam	Yes	Yes	Yes	Yes
Training requires a performance firearm safety exam	No	Yes	No	No
Training requires a "shoot/don't shoot" simulation	No	No	No	No
Cost of license or permit	\$80.00	\$45.00	\$67.00	\$200.00
Period for which license or permit is valid	Five years	Three years	Five years	Ten years

APPENDIX A (continued)

	Oregon	Pennsylvania	Rhode Island	South Carolina
Requires a permit or license to carry a concealed weapon	Yes	Yes	Yes	Yes
May issue/shall issue	Shall issue	Shall issue	Shall issue	Shall issue
Issues permits to nonresidents	Yes	Yes	Yes	Yes
Requires training	Yes	No	Yes	Yes
Training exceeds NRA standards	No	No	No	No
Training requires live fire shooting practice	Yes	No	Yes	Yes
Training requires a written firearm safety exam	Yes	No	Yes	Yes
Training requires a performance firearm safety exam	No	No	No	No
Training requires a "shoot/don't shoot" simulation	No	No	No	No
Cost of license or permit	\$65.00	\$30.00	\$40.00	\$50.00
Period for which license or permit is valid	Three years	Five years	Four years	Four years

APPENDIX A (continued)

	South Dakota	Tennessee	Texas	Utah
Requires a permit or license to carry a concealed weapon	Yes	Yes	Yes	Yes
May issue/shall issue	Shall issue	Shall issue	Shall issue	Shall issue
Issues permits to nonresidents	No	Yes	Yes	Yes
Requires training	No	Yes	Yes	Yes
Training exceeds NRA standards	No	No	Yes	No
Training requires live fire shooting practice	No	Yes	Yes	Yes
Training requires a written firearm safety exam	No	Yes	Yes	Yes
Training requires a performance firearm safety exam	No	No	Yes	No
Training requires a "shoot/don't shoot" simulation	No	No	No	No
Cost of license or permit	\$10.00	\$115.00	\$100.00	\$65.25
Period for which license or permit is valid	Four years	Four years	Four years	Five years

APPENDIX A (continued)

	Vermont	Virginia	Washington	West Virginia
Requires a permit or license to carry a concealed weapon	No license required	Yes	Yes	Yes
May issue/shall issue		Shall issue	Shall issue	Shall issue
Issues permits to nonresidents		Yes	Yes	No
Requires training		Yes	Yes	Yes
Training exceeds NRA standards		No	No	No
Training requires live fire shooting practice		Yes	Yes	Yes
Training requires a written firearm safety exam		Yes	Yes	Yes
Training requires a performance firearm safety exam		No	No	No
Training requires a "shoot/don't shoot" simulation		No	No	No
Cost of license or permit		\$50.00	\$55.25	\$90.00
Period for which license or permit is valid		Five years	Five years	Five years

APPENDIX A (continued)

	Wisconsin	Wyoming
Requires a permit or license to carry a concealed weapon	No such licenses issued	Yes
May issue/shall issue		Shall issue
Issues permits to nonresidents		No
Requires training		Yes
Training exceeds NRA standards		No
Training requires live fire shooting practice		Yes
Training requires a written firearm safety exam		Yes
Training requires a performance firearm safety exam		No
Training requires a "shoot/don't shoot" simulation		No
Cost of license or permit		\$74.00
Period for which license or permit is valid		Five years